TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 22

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, APPELLANT,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND CITY OF LOS ANGELES

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MARCH 20, 1953

Jurisdiction Postponed May 18, 1953

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INDEX

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[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CITY OF LOS ANGELES, a Muncipal Corporation,

Respondents,

PETITION FOR WRIT OF REVIEW—Filed July 24, 1952

Your petitioner, hereinafter referred to as Santa Fe, respectfully applies for a Writ of Review, by this, its verified petition, for the purpose of determining the lawfulness of Decision No. 47344 of the Public Utilities Commission of the State of California, dated June 24, 1952, and the Order on Rehearing contained therein; and in this behalf sets forth the following facts and causes for the issuance of the writ:

I.

Your petitioner is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kansas, lawfully doing business in the State of California and in the City of Los Angeles, as a common carrier by railroad, between points in California and also in interstate commerce, with [fol. 2] its principal place of business in California at 121 East 6th Street, Los Angeles, California. As such common carrier, your petitioner was at all times mentioned herein, and is, subject to the provisions of the Public Utilities Code and the Public Utilities Act of the State of California.

II.

That at all times herein mentioned the respondent, Public Utilities Commission of the State of California, was and now is an administrative and quasi-judicial tribunal,

created and existing under and by virtue of Sections 22-24, inclusive, of Article XII of the Constitution of the State of California, and by virtue of the Public Utilities Code and Public Utilities Act of California; and at all times herein mentioned the respondent, City of Los Angeles, was and now is a municipal corporation, created and existing by virtue of Article XI of the Constitution of California, and by virtue of statutory authority. For convenience, respondents will be sometimes referred to as "the Commission," or "the City," respectively.

III.

That on the 4th day of June, 1948, the City of Los Angeles filed its Application No. 29396 with the Public Utilities Commission of California, seeking authority to enlarge two existing underpasses on Washington Boulevard below petitioner Santa Fe's tracks. After public hearing and submission of points and authorities, the Commission, by its Decision No. 43374 dated October 4, 1949, authorized the City to enlarge the underpasses, further providing that the expense thereof was to be borne by the City, with the exception of the sum of $95,160.00 which was to be paid by Santa Fe. On November 22, 1949, [fol. 3] the City filed a petition for rehearing, and on December 2, 1949, Santa Fe filed a petition for rehearing.

Thereafter a rehearing was granted March 28, 1950, and public hearings were held thereon, followed by submission of points and authorities, and, on November 28, 1951, by oral argument before the Commission *en banc*.

On June 24, 1952, the Commission rendered its Decision No. 47344, the decision herein complained of, sometimes hereinafter referred to as the decision, in which Santa Fe was ordered to pay 50% of the cost of the proposed structures in contrast with the Commission's earlier Decision No. 25069, dated August 15, 1932, wherein Santa Fe was ordered to pay 25% of the cost of enlarging these same structures. After this decision the City did not build within the required time limit of one year and the order lapsed and became ineffective pursuant to its terms. Thereafter the 1952 decision increased the amount to be paid by Santa Fe from $95,160.00 as provided for in Decision No.

43374 dated October 4, 1949, to $284,677.50 for the reasons explained in Decision No. 47344 dated June 24, 1952.

IV.

That the two underpasses herein concerned are located under the Santa Fe at Washington Boulevard, a principal East-West arterial highway across the City of Los Angeles, between Soto Street and Santa Fe Avenue. The railroad above the underpasses is near a junction of the Santa Fe's harbor line, consisting of a right-of-way 66 feet wide which was placed in operation on September 23, 1887; and one [fol. 4] of Santa Fe's main lines to the East, consisting of a right-of-way 100 feet wide which was placed in operation on November 24, 1888.

Prior to 1914, three tracks of the Santa Fe crossed the area now known as Washington Boulevard, at grade. There was no open street at or near the underpasses in the present location of Washington Boulevard. In 1914, pursuant to a contract between the City and Santa Fe, the two presently existing underpass structures, each 20 feet wide, approximately 200 feet apart, were constructed to give the City's garbage trucks easier access to a garbage disposal plant located east of the tracks. The City and Santa Fe by agreement each paid one-half of the costs thereof.

Subsequent to the building of the railroad tracks the City acquired easements for street purposes, partly from Santa Fe, and in 1931 constructed a bridge across the Los Angeles River a short distance easterly of the underpasses, and opened up Washington Boulevard as an arterial street from the Pacific Ocean on the west to Whittier Boulevard, east of the City. In 1926, Santa Fe required for railroad purposes, and built at its sole expense, an additional superstructure and track to provide a second main line track. Thus each bridge over Washington Boulevard now carries two tracks.

V.

By its Decision No. 47344, dated June 24, 1952, the Commission unlawfully, arbitrarily, unreasonably and unconstitutionally exceeded its authority, and its jurisdiction, and deprived Santa Fe of its constitutional rights to due process and equal protection of the laws, and of its property

without just compensation, placing an undue burden on interstate commerce, all in violation of the Constitution of [fol. 5] the United States of America, 5th and 14th Amendments, and the Commerce Clause, and in violation of the California Constitution, Article I, Sections 13 and 14, in the following particulars:

A.

Under the guise of the police power, the Commission assessed 50% of the cost of the proposed projects to the Santa Fe. This figure is, on its face, an arbitrary and excessive determination without any apparent effort to determine, mathematically or from an actuarial standpoint, or otherwise, the value of the benefits, if any, Santa Fe could receive from the construction of the underpasses, the value of any additional safety factor which the new underpasses might provide either to Santa Fe, to the public, or at all, or to make the imposition bear reasonable relation to the evils to be eradicated or the advantage to be secured.

Just how the Commission arrived at 50% in a nice, round percent, is nowhere apparent either in the evidence or in the Decision. If the Commission utilized its sizeable staff and ample public funds to determine, on a rational basis, what the percentage (if any) assessed to Santa Fe should be, the record and the Decision fail to disclose the method; and the Commission must have gone outside the record in so determining.

B.

The Rehearing Order contained in the Decision takes Santa Fe's property without just compensation, in violation of the 5th Amendment of the United States Constitution, and Article I, Section 14, of the California Constitution.

[fol. 6] At page 18 of the Rehearing Order, the Commission finds that the proposed improvement is "not without benefits" to the railroad, allegedly in the operation of longer trains without delays, without hazard of accidents, and in replacement of a depreciated bridge with a newer bridge.

After indicating that the benefits to Santa Fe are *de minimus*, the Commission assesses to Santa Fe one-half of the

costs, an excessive amount, thus exceeding its authority and violating the United States Constitution, in that the benefits to be derived by Santa Fe are not nearly equivalent to the sum assessed against it. There is no indication in the Rehearing Order that there is either a reasonable relation, or any relation, between the benefits mentioned in the order and the sum assessed to the Santa Fe.

C.

The Rehearing Order burdens interstate commerce, in violation of the commerce clause of the United States Constitution, and the "National Transportation Policy" as expressed in the Interstate Commerce Act (54 Stat. 899). The underpasses in question are but one project in a state looking forward to several such projects in the future. Santa Fe is an interstate railroad, and must face the cost of other such projects in this and other states, making the high cost here assessed an unconstitutional burden on interstate commerce.

The Rehearing Order (at page 16) apportions the costs in the exercise of its "sound discretion," for the public [fol. 7] convenience and necessity, thus arbitrarily deciding that Santa Fe should pay the amount the Commission desires that it should pay. Therefore:

(1) If the 50% assessment so fixed was derived from an exercise of the Commission's police power, it is limited by the constitutional safeguard that there must be a reasonable relationship between the amount assessed and the evils to be avoided and results to be accomplished, or

(2) If the Commission exercised the power of eminent domain in making the assessment, Santa Fe is entitled to just compensation in the form of benefits to be derived from the enlargement of the underpass structures and to a reasonable assessment on that basis.

There is no substantial evidence justifying an assessment against Santa Fe of one-half of the costs, under either the police power or the eminent domain, or both.

D.

The Rehearing Order arbitrarily increased Santa Fe's proportion of the costs from 25% as assessed in 1932

(See 37 C. R. C. 787), to 50% in this 1952 order. There is no reasonable basis in the evidence for doubling the percentage of the apportionment of costs against Santa Fe.

The Rehearing Order disregards the overwhelming evidence that changed conditions in the interval of the past 20 years would warrant a smaller, rather than a larger, assessment of costs against the railroad.

[fol. 8]

E.

The Decision fails to find ultimate facts on material issues, makes findings not supported by any substantial evidence, and makes findings contrary to the evidence, thus denying to Santa Fe its constitutional right to procedural due process.

At page 17 of the order, for example, the finding is made that the proposed construction is to meet *local* transportation needs, and that the City's contribution must come from local funds. However, the substantial evidence is to the contrary.

At page 18 of the Rehearing Order, there is a finding that the railroad will benefit by the construction; whereas the uncontradicted evidence shows that it can operate long trains without delay, and without hazard of accident, over the existing structures, and that the present bridges, built in 1914, still have 50 years, or more, of use and thus are *not* 75% depreciated.

The Commission fails to make any finding respecting the important factor of avoiding delay to vehicular traffic, the benefits to be derived by vehicular traffic from enlarging the underpasses, or the primary necessity for the enlargement being the need for increasing traffic capacity for motor vehicles.

F.

Under the guise of constitutional authority, the Commission requires Santa Fe to pay one-half of the costs of a major improvement of Washington Boulevard, a principal East-West street and highway across the City and of Los Angeles County. The Rehearing Order thus requires Santa Fe to subsidize its competitors, the commercial [fol. 9] truckers, which the undisputed evidence discloses utilize Washington Boulevard extensively and, if the under-

passes are enlarged, will make even greater use for access to and from Los Angeles, the industrial area, the harbor and the hinterland.

The Commission refused to make any findings on, or give any effect to, the substantial undisputed evidence that in recent years the railroads have ceased to expand; whereas the population of the City and the State of California has increased over 500%, that the use of automobiles, buses and trucks has increased tremendously, and highway carriers have taken over an increased proportion of all commercial transportation by the use of larger, wider, higher and faster automotive equipment and would reap the greatest benefit from the proposed construction.

The Commission, moreover, failed to make any finding on, or to give any effect to, the substantial undisputed evidence that the factor of delay—particularly as to the commercial trucking industry—is the most important factor necessitating the proposed enlargement of the existing grade separations. The Commission thus deprives Santa Fe of its constitutional right to equal protection under the laws.

G.

If the Rehearing Order becomes effective and final, Santa Fe will suffer irreparable damage, and the loss of approximately $285,000.00.

H.

The pleadings, testimony and exhibits summarized in the Appendix are by this reference made a part hereof. [fol. 10] Petitioner also files concurrently herewith its Points and Authorities in support hereof.

Wherefore, your petitioner respectfully prays:

1. That the writ of review issue out of this court to the Public Utilities Commission, demanding it to certify fully to this court, at a specified time and place, the record and proceedings in this cause, that the same may be inquired into and determined by this court;

2. That the said matters and records be fully heard and considered by this court, and that it be ordered, adjudged and decreed that the Rehearing Order made by the said

respondent Commission against your petitioner be annulled, vacated and set aside;

3. That in the meantime the respondents, and each of them, be required to desist from further proceeding in the said matters to be reviewed and that the order requiring petitioner to pay a portion of the costs of the proposed projects be stayed;

4. That your petitioner recover its costs herein, and that it have such other and further relief as may be proper and just in the premises.

Robert W. Walker, Joseph H. Cummins, By Joseph H. Cummins, Attorneys for Petitioner, The Atchison, Topeka and Santa Fe Railway Company, a Corporation.

[fol. 11] *Duly sworn to by S. A. Forrester. Jurat omitted in printing.*

[fol. 12] APPENDIX "A" TO PETITION.

PETITION FOR REHEARING OF PROTESTANT, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

To the Honorable, the Public Utilities Commission of the State of California:

The Atchison, Topeka and Santa Fe Railway Company, the protestant in the above entitled proceeding, hereby respectfully petitions for a rehearing in respect to the matters determined in said proceeding by Decision No. 43374 of this Commission. There is also appended hereto an argument in support of this petition and an argument in opposition to the petition for rehearing heretofore filed by applicant, The City of Los Angeles. This petition for rehearing is based on the following grounds:

I.

In view of this Commission's findings that the City is the sole party to be benefitted by the proposed structure, the conclusion of this Commission is erroneous and contrary to the law that the Santa Fe should be assessed one-

half of the costs attributable to the existence of the railroad at the crossing.

II.

The facts and the testimony, both oral and written, and the findings of this Commission are all to the effect that the proposed structure will solely benefit the City and will not only be of no benefit to the Santa Fe but will actually be a detriment.

III.

The decision is contrary to the law in that it is contrary to the decisions of this Commission which have for [fol. 12a] almost twenty years followed the "benefit" theory in assessing costs in cases such as this.

IV.

The decision is contrary to the law in that the attempted assessment against a railroad of any costs in a case such as this in which no benefits whatsoever will accrue to the railroad from the proposed structure is an unconstitutional taking of property without due process of law within the bars of the Fourteenth Amendment to the United States Constitution and Article I, Section 13 of the Constitution of California.

V.

Appended hereto is an argument in support of the above propositions.

Wherefore, protestant, The Atchison, Topeka and Santa Fe Railway Company, respectfully requests that this Honorable Commission grant a rehearing in this case and that upon such rehearing this Honorable Commission issue its order requiring the City of Los Angeles to bear the entire cost of the proposed widening of the existing grade separation at Washington Boulevard and requiring that no part of such cost be allocated to The Atchison, Topeka and Santa Fe Railway Company.

Dated at Los Angeles, December 2, 1949.

Respectfully submitted, Robert W. Walker, William F. Brooks, By Robert W. Walker, Attorneys for Protestant, The Atchison, Topeka and Santa Fe Railway Company.

[fol. 13] APPENDIX "B" TO PETITION.

INTRODUCTION

The following is a summary of the voluminous record in this matter, consisting of a summary of the pertinent pleadings, testimony and exhibits:

SUMMARY OF PLEADINGS.

A. The Original Application.

The application of the City of Los Angeles, filed June 4, 1948, alleges that the two underpasses of Santa Fe's tracks below Washington Boulevard are approximately 200 feet apart; that Washington Boulevard is a public street extending from the Pacific Ocean near Venice, Easterly, through the entire breadth of the City for a distance of several miles East of the City to Whittier Boulevard, traversing the principal industrial district of the Los Angeles Metropolitan Area; that if its usefulness were not impaired by the narrowness and limited vertical clearance of its underpasses, it could and would be one of the principal carriers of traffic to, from and within the industrial district.

That, 520 feet East of the underpasses, Washington Boulevard crosses the Los Angeles River, which was bridged in 1931; that the Santa Fe's harbor line and main line cross Washington Boulevard on existing trestles constructed on steel girders supported by concrete abutments, and have a vertical clearance of between 13 and 14 feet; that these trestles were built in 1914 to facilitate access to the City's garbage reduction plant; that the cost was borne by the City and by Santa Fe equally; that in 1914 [fol. 14] the main line of Santa Fe consisted of one track, but in 1926 Santa Fe at its own expense added a second track and reconstructed the trestle for that purpose;

That in 1914 there was very little motor traffic in the area, but since that time the City has grown immensely and the motor vehicle traffic, including commercial trucking, has increased enormously; and that the industrial district nearby has become one of the great industrial districts of the nation;

That the underpasses, because of their narrowness and

inadequate vertical clearance, constitute a hazardous impediment to traffic, and have caused many serious accidents and traffic congestions; that large commercial trucks can pass only at peril of sideswiping;

That there is no bus transportation, although there is a public demand for it, because of the limitations of the underpasses; that persons who work in the area must travel by circuitous routes;

That because of congestion, many motor vehicles, and particularly large trucks which would normally use Washington Boulevard, are diverted to other streets, resulting in loss of man and vehicle hours and increased expense of transportation;

That, for the above reasons, the public need, safety, welfare and convenience require that the underpasses be enlarged, and their height be increased;

That the City proposes to widen the underpasses to 90 feet, with 15 feet clearance above; and prays for an order authorizing the enlargement of the underpass structures and requested that the Commission allocate the costs between Santa Fe and the City.

[fol. 15] B. The Answer.

The answer of Santa Fe alleged that the cost of enlarging the existing underpasses should be borne by the applicant City; that any need for wider structures cannot be traced to any requirements of the Railroad; that the present structure is wholly sufficient for railroad purposes, and that any need for enlarging the structures is brought about solely because of increase in vehicular traffic;

The answer further alleged that any obligation Santa Fe had to share the costs of grade separation structures was satisfied by sharing the costs of the original construction in 1914, and that when traffic needs of the railroad required additional trackage over Washington Boulevard in 1926, it was paid for solely by Santa Fe;

Conversely, that when the Boulevard below the tracks needs expanding because of increased vehicular traffic, the railroad should not have to pay part of the cost;

That no benefit will accrue to the railroad but, on the

contrary, enlarging the structures will compel Santa Fe to defray the cost of maintaining larger bridges;

That to require Santa Fe to pay part of the cost would result in a direct subsidy to its competitors, in the form of trucks and buses, who will derive all of the benefits;

That the purpose of widening the underpasses is not to avoid collisions with trains, but to provide better facilities for vehicular traffic;

Santa Fe prays, therefore, that it not be required to bear any portion of the cost of rebuilding the Washington Boulevard underpasses.

[fol. 16] C. Decision No. 43374 of the Public Utilities Commission Dated October 4, 1949 (Superceded by the Order on Rehearing.)

The Public Utilities Commission rendered its opinion and decision, reciting from the petition and answer, and from the testimony;

It referred to the 1932 decision when the same parties were before the Commission in a similar proceeding, involving the same two crossings, at which time the City sought to enlarge the two grade separations to a width of 56 feet; that in 1932 the Commission issued its order authorizing the widening, and apportioning costs: 25% to Santa Fe, and 75% to the City;

In its 1949 order, the Commission finds: That the widening of the underpass "is now necessitated by the increase in vehicular and pedestrian traffic. . . ." (P. 7);

It noted that the vicinity had become a leading industrial area of Los Angeles and its environs, and that a large amount of truck traffic hauled to and from the area;

It stated that a fair view of all of the evidence supported Santa Fe's contention that none of the factors necessitating enlarging the underpasses was due to the operation of the railroad (p. 8). It stated:

> "Thus we are specifically faced with the problem of who shall pay the cost of widening of the underpass where the necessity for such widening is not due to the [fol. 17] activities of the railroad, but rather to the needs of the automotive and pedestrian traffic." (P. 8.)

The Commission noted Exhibit 20, General Administrative Memo. No. 325 of the Public Roads Administration, Federal Works Agency, United States Government, limiting costs of new grade separation projects assessable to the railroad at no greater than 10%, and in case of reconstruction of existing separation structures directing that no contribution to the cost shall be required of the railroad.

The decision quotes with approval from its 1932 decision, wherein the Commission held that direct financial benefits is not the sole test to use in apportioning costs, and that due consideration should be given to the obligations of each party, as well as to the benefits derived by each;

It held that Santa Fe should bear 50% of the cost, pursuant to a formula whereby the Commission deducted 20 feet of the proposed 90-foot structure to allow for the width of existing underpasses and held that the excess width, over 56 feet, was attributable to future City planning; that, therefore, only 36 feet of the structures was attributable to the presence of the railroad, and the railroad should pay half of the cost of 36/90 of the bridge; which came to $95,160.00.

[fol. 18] Summary of the Evidence Taken at the Original Hearing and considered as Part of the Evidence on the Rehearing by Stipulation Between the Parties.

H. F. Holley, applicant's witness, testified that he was employed by the Automobile Club of Southern California as Assistant Chief Engineer; he submitted Exhibit 1 and stated that the need for the enlarged underpasses was the result of increased vehicular traffic; he had made no study of railroad operations or needs at the place in question (Tr. pp. 7-8).

He noted that there is a tremendous flow of traffic on Washington Boulevard, and recommended that vertical clearance be increased from 13.66 feet and 13.77 feet, now existing, to 14½ or 15 feet (Tr. p. 10).

Howard P. Mason, applicant's witness and Secretary of the Metropolitan Traffic & Transit Committee of the Los Angeles Chamber of Commerce, testified to the increase in population and vehicle registration in Los Angeles (Tr. p. 11).

Ralph T. Dorsey, applicant's witness and Principal Traffic Engineer of the City, testified that Exhibit 2 showed the amount of traffic using streets in the vicinity of the grade separations, the directional volume of such traffic, and the left and right turns made by the traffic (Tr. p. 13). He stated that the existing underpasses are potentially and actually a hazardous condition (Tr. p. 18); he submitted Exhibits 3 to 7, inclusive, depicting insufficient vertical clearance and inadequate horizontal clearance; that there is a record of some accidents there; traffic con- [fol. 19] ditions would be relieved throughout the area by an adequate underpass (Tr. p. 19). He recommended the construction of a 3-lane underpass each way, each lane 11 feet wide, and at least one sidewalk (Tr. p. 21).

Mr. Dorsey further testified that a public benefit would result from widening the underpasses, for the reason that traffic would continue with less delay and that Washington Boulevard could be used as a feeder for new freeways (Tr. p. 29); thus relieving parallel streets of a considerable burden (Tr. p. 31); that a crosstown busline would be one of many public benefits, reducing traffic since the public would use a bus instead of their own automobiles (Tr. p. 32); thus reducing hazards by reducing the number of automobiles used (Tr. p. 33).

Hugo H. Winter, applicant's witness and Street and Parkway Designing Engineer of the Bureau of Engineering of the City (Tr. p. 39), testified to the cost of the proposed structures, and to the history of the construction of the existing separations; he also submitted designs for bridge structures. (His testimony is not in dispute and will not be set forth at any greater length.)

Harold O. Springer, applicant's witness and Engineer with the City, testified to costs of the proposed structures, and stated that it was the City which felt the need for widening the underpasses (Tr. p. 72).

K. Charles Bean, applicant's witness and Chief Engineer and General Manager of the Department of Public Utilities & Transportation of the City of Los Angeles, testified that as long ago as 1939 it was recommended that a busline be inaugurated on East Washington Boulevard; that the Los Angeles Railway Company felt that such a

line could not be of maximum benefit until there was a [fol. 20] better way of crossing the Santa Fe, the existing underpasses being inadequate and constituting an unreasonable hazard for the operation of a busline—studies indicated sufficient patronage, and such a service would help other lines relieve congestion downtown, but could not operate successfully because of too much delay (Tr. pp. 76-77).

Milton Breivogel, applicant's witness and Principal City Planner of the City, described the industrial area in the vicinity of East Washington Boulevard (Tr. pp. 78, 84); he also testified concerning population and vehicle registration increases, giving the number of persons residing within a five and a ten mile radius of the underpass (Tr. p. 82).

According to this witness, all streets today are loaded with traffic, and more street capacity must be provided for vehicles, especially in the area involved, where public transportation would become increasingly important (Tr. p. 86).

A. M. C. Blanchard, witness for protestant, Chief Engineer of the Coast Lines of the Santa Fe, testified to the history of the construction of the existing underpasses, outlining the proceeding before the Commission in 1932 in which Santa Fe was assessed 25% of the cost of enlarging these grade separations, which order lapsed after one year because construction was not commenced; that in 1932 the City sought to build a 56-foot wide street under Santa Fe's tracks, but now seeks a 6-lane trafficway, obviously necessitated by increased vehicular traffic; according to this witness, the sole beneficiary of the improvement would be the public, which should pay the entire cost.

[fol. 21] Mr. Blanchard compared the instant situation with Administrative Memo. No. 325 of August 26, 1948, on the subject "Railway Benefit and Liability under the Federal Aid Highway Act of 1944" pursuant to which the railroad would not have to bear any cost for reconstruction of existing separation structures (Tr. p. 94) there being no ascertainable benefits therefrom.

He pointed out that in Arizona, in the preceding year, two separations on the Santa Fe had been reconstructed, in neither of which cases was Santa Fe called upon to pay any of the cost (Tr. p. 95).

Mr. Blanchard denied knowledge of any case in which the public had contributed to the cost of a grade separation involved in the building of a new line of railroad; and, in the past, stated that the Santa Fe in building a new line had paid the entire cost (Tr. p. 97).

In his opinion, the railroad would not be benefited by enlarging these subways, and the public would be the sole beneficiary (Tr. p. 98); that the present structures are wholly sufficient for future railway requirements, and the new structures would only increase the costs of maintenance and improve the highway facilities for trucks and buses, which are competitive with the railroad (Tr. p. 99).

The following is EVIDENCE ON REHEARING, commencing December 27, 1950:

Harold O. Springer, recalled as a witness for applicant, testified regarding heights and costs of bridges, the feasibility of widening the bridge over the Los Angeles River immediately to the east, and gave the height of existing bridges over the street as 13.66 feet and 13.75 feet (clearances) (Tr. p. 25). (There is no dispute in the evidence as to the types or costs of bridges.)

[fol. 22] Hugo H. Winter, recalled by applicant, testified that it is feasible to widen the Los Angeles River bridge at moderate expense; he recommended construction of underpasses wider than 56 feet (Tr. p. 37); he described Washington Boulevard as one of the very important traffic-carrying arteries leading across the City and into the County (Tr. p. 38); traffic lanes of 9 feet are not now considered adequate; that 10 feet is a suitable minimum, especially on a highway like Washington Boulevard where there is a relatively heavy flow of truck traffic; that two roadways of 33 feet width are recommended; that the reason 9 foot lanes are insufficient is because cars and trucks have increased in width, and must take into account that they now travel faster (Tr. pp. 38-39); that it is proper to provide for pedestrian use of the street, although there are no sidewalks now existing between Santa Fe Avenue and Soto Street in Washington Boulevard (Tr. pp. 40-41).

(His testimony regarding the costs of the proposed structures is not disputed (Tr. p. 44).)

Mr. Winter testified that, on freeway construction, six feet is allowed from the curb to the base of the abutment to keep cars and trucks from crowding toward the center of the roadway; with two 10-foot lanes and opposing traffic, that the abutment adjacent to the roadway is a hazard, particularly for large trucks; that in former years 14 feet vertical clearance was considered desirable, but that now on modern grade separations a minimum of 15 feet is provided (Tr. p. 48); that City officials are agreed that Washington Boulevard is one of the City's very important east-west thoroughfares, it carries tremendous traffic as far east as Alameda Street where it is improved; that east of Alameda Street there is a large open pit which prevents [fol. 25] complete improvement on the permanent lines of the boulevard; that between Santa Fe Avenue and Soto Street are the narrow railroad Santa Fe underpasses which prevent the complete improvement of Washington Boulevard in that section; that there is a tremendous diversion of traffic between Alameda Street and Soto Street because of the inadequacy of the existing roadways in both sections (Tr. pp. 51-52).

He testified that trucks and mixed traffic make necessary the construction of wider traffic lanes (Tr. p. 72); that the *prima facie* speed limit on Washington near the underpasses is 25 miles per hour (Tr. p. 72); that the need for higher vertical clearances arises solely because of the height of trucks (Tr. p. 74); that the existing underpass structures became inadequate when Washington Boulevard bridge was built across the river in 1931 (Tr. p. 81); that before Washington Boulevard was made a through street it simply handled traffic in and out of the garbage disposal plant and the City's maintenance yard (Tr. p. 82); that when the City built the bridge across the river there was a pressing need of opening up Washington Boulevard between Santa Fe Avenue and Soto Street, so that it could become a link in not only a cross-city but, also, a cross-county highway that was rapidly being developed (Tr. pp. 82-83).

Mr. Winter stated that there is a provision being made to connect Washington Boulevard at Telegraph Road with the Santa Ana Freeway that is being constructed (Tr.

p. 84); that the delay factor is one of the large factors in establishing the need of these grade separations; that from the standpoint of benefit, the widening of the underpasses would furnish more traffic capacity, which is now diverted to other streets (Tr. p. 85); that 10-foot traffic [fol. 24] lanes are satisfactory except where there are curves or heavy truck traffic, and then 11-foot lanes are a desirable minimum (Tr. p. 92); that buses are as wide as 104 inches; that truck maximum is generally 96 inches (Tr. p. 94); and he estimated that if the railway did not cross Washington Boulevard the street could be widened to the desired width for $111,750, that the proposed underpass structures would cost $812,750.00, making the difference due to the presence of the railway $701,015.00 (Tr. p. 99).

Ralph T. Dorsey, Principal Traffic Engineer of the City of Los Angeles, applicant's witness (Tr. p. 107), further testified that the percentage of trucks using East Washington Boulevard at the underpasses in 1950 was 9,474 passenger cars vs. 2,537 trucks, the ratio being approximately 26% trucks (Tr. pp. 110 and 113); that these trucks go generally either up the coast, to Sepulveda Boulevard, the Valley or the harbor; the center of gravity is Washington and Alameda, and from there the trucks move in four directions; Washington and Alameda is the center in relation to industry and the harbor, and is the focal point of truck traffic to the "four winds and from the hinterland" (Tr. p. 115); that if Washington Boulevard were widened, trucks and autos both would make more use of it; that Washington Boulevard underpasses are about 4,300 feet east of the intersection of Washington and Alameda.

Exhibit 27, introduced by this witness, shows the results of a traffic delay check on Washington Boulevard west of the underpass. He said that the largest percentage of trucks using Washington Boulevard are of a local nature; that the large trucks—or the greater percentage of them, [fol. 25] and the trailers, would be through traffic; the large trucks and the reefers come from the hinterland, bringing commodities to a point of distribution which centers at Washington and Alameda; from there they go to the four tradewinds—the harbor, industry and markets, and such (Tr. pp. 140-141). That on Alameda 38% of the traffic

is trucks; it is the main truck artery in the City (Tr. p. 143); that the large trucks that we are talking about are the ones that come from San Francisco or Portland, coming into the industrial area or harbor (Tr. p. 144).

He testified that if the underpasses under Santa Fe's tracks were enlarged, it was his opinion that more of the large trucks very definitely would use Washington Boulevard (Tr. p. 145); that at the present time there is a large turning movement to avoid the underpasses on Washington Boulevard, trucks and auto traffic avoiding these underpasses (Tr. pp. 146-147).

Exhibit 28, then introduced, shows the up-to-date accident record in and near the underpasses.

Robert C. Neil, interested party witness, traffic manager of the California Fruit Growers Exchange, testified that of 80,000 carloads of citrus fruit, 10% are handled by truck and the balance by rail; that transportation is the largest item of expense in marketing of the fruit; he expressed an interest in the conservation and preservation of railroad revenues, and urged the Commission to fix as the carrier's proportion of the construction cost of the enlarged grade separations an amount no greater than the value to be derived by Santa Fe (Tr. pp. 165-166).

F. G. Seig, interested party witness, the legislative representative of the California State Legislative Committee, [fol. 26] Order of Railway Conductors, testified that he had been authorized by the Brotherhood of Locomotive Firemen and Enginemen to represent that organization in the instant proceeding, as well as his own brotherhood; he called attention to the resolution of the Order of Railway Conductors declaring its responsibility to cooperate with all others interested in grade crossing elimination, on the basis of Federal Statutes limiting the costs to be paid by the railroads to 10%; that this resolution was adopted by 19 to 21 Railway brotherhoods; that another resolution thereof, adopted in 1950, called attention to the fact that highway transportation in many states was being subsidized by the high apportionment of costs of grade separations upon railroads, that the approach to this problem should be realistic and conform to the principles applicable to Federal projects (Tr. p. 171).

He stated his position that, in any case involving such cost apportionment, the amount to be paid by the railroad should be based upon the benefits received (Tr. p. 171).

Arthur C. Jenkins, protestant's witness, qualified as a consulting engineer with many years of experience in various phases of transportation problems (Tr. pp. 174-182):

At protestant's request, he said he had prepared an extensive report, which was introduced as Exhibit 29-RH, covering all the factors he considered important to the question of cost apportionment in grade separation cases; to prepare the report he had gone to numerous official and unofficial records, reports and analyses as listed on page A-35 of Exhibit 29-RH.

Explaining Exhibit 29-RH, Mr. Jenkins testified as follows: he had first considered the role of the railroad, which [fol. 27] was a newcomer in the transportation field in 1830, as one of an aggressor (Tr. p. 187); that at that time highway traffic was short and local in character, and the railroads were the first long-haul overland carriers, crossing existing highways with ponderous equipment, creating a danger to travel on the highways; that as time went on, the trend reversed, and highways became more extensive than the railway systems; population increased enormously, and the use of motor vehicles developed at even more rapid rate than the highway system (Tr. p. 190); that there came a time when rail transportation failed to keep pace in proportion with the increase in population and needs; and in California, particularly, highways increased between 1920 and 1949 a percentage of 596.9% (Tr. p. 191); early roads were single lanes, but in recent years have increased from two lanes to multiple-lanes, and the width of the lanes has increased from 7 feet to 12 feet; that vehicles using the highways have become longer, taller and wider (Tr. p. 192); he stated, further, that,

Whereas in the early days the railroad was extended across highways and created the accident hazard, that the railroad's lines have been established for many years without substantial change, and now it is the highway system that has taken the role of expanding and with resulting highways, superimposed upon railroads, and assuming the mantle of the aggressor (Tr. pp. 192-193); he said,

moreover, that speed and acceleration of traffic on the highway has increased, with the biggest change in character of commercial traffic on highways (Tr. p. 193); that with higher speeds on the highways, the tendency is towards more serious accidents; that the commercial vehicles, being larger, cause greater damage to rail equipment in accidents, [fol. 28] and to passengers and crew members; that fuel tank trucks create hazards (Tr. p. 194);

He stated, further, that with the shift of the role of aggressor from the railroad to the highway, there is also a shift in responsibility (Tr. p. 195); that traffic delay is a principal consideration in grade separations today; the seriousness of accidents and their number have not gone up in proportion to the increase of vehicles; that further programming of grade crossing elimination is due more to the desire to decrease the amount of traffic delay than it is due now to the accident hazard.

Table A-24, of Exhibit 29-RH, shows the decrease of accident casualties in proportion to motor vehicles registered.

That there are accepted engineering standards used to figure the cost of traffic delays, he stated; it amounts to 75 cents per hour for automobiles and $3.50 per hour for commercial vehicles; and in his opinion delay is the predominant factor in the instant proceeding (Tr. p. 198); that the increasing highway traffic has thrown a greater load on grade crossings, and the nature of the traffic has tended to increase the hazards (Tr. p. 201).

He said that economic studies have been made to show what the railroad derives in the way of economic benefits, and that has been done in proceedings before this Commission and others, the amount being capitalized as a basis for determining the allocation of costs; the benefit of such separations goes largely to the highway traffic (Tr. p. 201).

He stated that when the highways were established, and the railroads built over them, the railroad was the aggressor; but now the responsibility has been swinging in the [fol. 29] other direction, since highways in recent years have been superimposed over the rails (Tr. p. 202); that when the railroads must contribute to these structures, it is to their adverse interests because it expedites competitive

traffic and injures the railroads' competitive position as a carrier; that the passenger automobile has created a diversion of passenger traffic from the railroads; that, in the case of truck traffic, according to Interstate Commerce Commission records it costs the railroads 23 cents out of each gross revenue $1.00 to maintain and finance their right of ways, whereas the comparison with motor carriers is 3.7 cents (Tr. p. 204).

He explained that Chapter 1 of Exhibit 29-RH traces the development of highways (Tr. p. 205); that Table A-19 thereof shows the apportionment of funds from motor vehicle fees and fuel taxes, showing millions of dollars allocated to City streets (Tr. p. 208); that the cities get part of the Gas Tax Fund (Tr. p. 209).

On several different bases Table 11, page A-11 of Exhibit 29-RH, and subsequent exhibits, show the peak of railroad development to have been in the early 1920's (Tr. p. 210); that since then passenger traffic has been diverted to the automobiles, buses and highways, and rail traffic has shown a downward trend in relation to the increase in population, with respect both to volume of traffic and of passengers (Tr. p. 212); that failure of the railroads to grow with the population growth is explained principally by diversion of transportation from the rails to the highways (Tr. p. 213).

He stated that a widening of the underpasses at Washington Boulevard would result in increasing the cost to the railroad of maintaining a larger structure, increase the volume of automobile and commercial vehicles on Wash- [fol. 30] ington Boulevard, and result in no traffic benefits to the railroad (Tr. p. 215).

That trucks, due to their size and increased power, and slow rate of acceleration, tend to create a delay factor on highways; that the formula measuring this factor rates one truck as equivalent to approximately 2½ autos, on a straight, level road, and as equal to 5 autos, on a 3% grade (Tr. p. 218).

That Chapter 3 on Financing Highway Development, Exhibit 29-RH, shows the method of financing as between the use of public and private funds, and in recent years also from Federal funds partly (Tr. p. 225).

Chapter 4 relates to the shift from the rails to the highways for increased traffic; traces the development of long-haul trucking, weighs the loss of traffic from the rails to the highways (See Table 9, page A-9, Ex. 29-RH); and shows the tremendous increase in the volume of traffic carried by trucks, this increase from 1927-1948 nationwide (See Table A-19, said Exhibit) being from 44-billion ton miles to 87-billion ton miles, approximately doubled; that the net result of highway development has been of no benefit to the railroads (Tr. p. 229); that increasing the size of the underpass structures on Washington Boulevard would have no bearing upon the volume of traffic carried by the railroad (Tr. p. 233); that in 1910 there was approximately one truck to 47 automobiles, and in 1950 the ratio is one truck to 6½ automobiles (Tr. p. 234); that the railroads have lost practically all the short-haul traffic in metropolitan areas, and have lost passenger traffic to the automobiles (Tr. p. 235); that the average traffic pattern in California in 1942 shows trucks representing 11½% to 20% or more of the total vehicles on the highways (Tr. p. 240).

[fol. 31] That from 1935 to 1949 the total number of railroad grade crossings has decreased, due to abandonments and elimination of crossings (Tr. p. 241).

Mr. Jenkins testified that Chapter 5 of Exhibit 29-RH traces the early period of development of the two modes of transportation; that years ago the railroads moved high-speed heavy equipment across highways, coming in contact with nothing larger than animal-drawn vehicles; that in recent years the character of highways has developed with increased volume of traffic thereon, permitting accidents between the railroads and heavy equipment on the highways, including tank trucks that could cause serious damage to the railroad.

Mr. Jenkins' conclusion, however, is that the problem of eliminating grade separations is not so much one of considering the accident hazard, as it is a matter of expediting traffic flow (Tr. p. 245).

That regulatory bodies can undermine the soundness of the railroad carriers, by placing on them arbitrary costs of grade separations; that in California, it has been estimated

by the Commission in case No. 4136, it would cost approximately two and one-half billion dollars to eliminate all railroad crossings; there is no practical way in which the cost of any specific grade separation crossing can be passed on by the railroad to its customers through the adjustment of rates, unless similar adjustments were made on the competitive, highway transportation (Tr. p. 250). The trend is still towards construction of highways and the expansion of their capacity. In contrast, the railroads over a period of years, on the average, have been on the decline (Tr. p. 251). In 1926, railroads handled 81.9% of the total rail and bus mileage in the country; in 1941, the rail propor- [fol. 32] tion had decreased to 68.3% (Tr. p. 252).

In the early period of our history, highways served largely as feeders to the railroads. Today, highways operate as the arteries of competitive traffic, and competition has taken over practically all types of transportation from the railroad within a distance of 50 miles from the larger cities (Tr. p. 253).

Chapter 6 of Exhibit 29-RH, Mr. Jenkins explained, presents a comparative study of the importance of grade-crossing accidents to other accidents, generally, and tends to show that percentagewise grade-crossing accidents have decreased, in proportion to automobiles and trucks registered, and constitute an extremely small percentage of all highway accidents (Tr. p. 260).

Chapter 7 thereof (Tr. p. 262) analyzes the cost of grade separations constructed in California; and shows that from 1910 through 1916, railroads carried the major proportion of cost of such separations; but in more recent years political subdivisions have been carrying practically all of the costs. (See page 62, and Table 21, Exhibit 29-RH, showing the number of grade crossing separations constructed up to 1931, and apportionment of the costs.)

In 1916, when the automobile came into the picture, the trend went over to allocations of larger amount of the costs to the public. The cost of individual grade separations has increased enormously, due to increased cost of labor and materials, and to the type of structures required to be built; that in early days a simple structure was used, but now the walls are no longer vertical and are set further

from the roadway, sidewalks are provided, and wide islands in the center of the roadway are built to accommo- [fol. 33] date change in the type and speed of vehicles using the highways (Tr. p. 264).

[Compare Table 28, page A-29, Exhibit 29-RH.]

Chapter 8, entitled BENEFITS TO RAILROADS FROM GRADE CROSSING SEPARATIONS, Mr. Jenkins testified (Ex. 29-RH, p. 68) analyzes results of studies in other states. He referred to the *Goshen Junction* case, decided by the Commission, in which the decision was rendered on the basis of capitalizing the financial benefit to the railroad, and assessing the railroad, out of a total cost of $340,000.00, the sum of $15,000.00 as the railroad's share. Summarizing the results in several other states, studies reveal four per cent of the cost to be the benefit derived by the railroad from the separation of grades (Tr. p. 270).

Chapter 9 (at Tr. p. 271) is a summary of state practices on cost allocations in other states. Those states allocating 50% of the cost to the railroads are primarily the Southern states; those allocating 25%, or less, are primarily the industrial and thickly-populated Northern states. States adopting legislation in recent years have decreased the amount allocable to the railroads for new grade separations to a maximum of 10% to 25% (Tr. p. 273).

Mr. Jenkins (commencing at p. 275 of Transcript) explained the tables in the appendix of Exhibit 29-RH. These are largely self-explanatory.

Exhibit 30-RH (Tr. p. 280) shows that in 1949 steam railroads in California received 20.9% of the gross revenue for the transportation of property, and the highway carriers, 73.7%. In 1938, those percentages were 27.8% for the railroads, and 65.9% for the highway carriers . . . and [fol. 34] this during a period of war, when there were limitations on truck transportation and use of gasoline and tires.

Exhibit 31-RH (Tr. p. 284) shows cost apportionment in California of grade separation projects for the years 1920 to 1948.

In the City of Los Angeles, the principal East and West street South of Washington Boulevard is Manchester;

North of Washington Boulevard, the principal East-West street is Olympic Boulevard (Tr. p. 291); and Mr. Jenkins observed that Washington Boulevard carries a heavier proportion of truck traffic than does Olympic Boulevard—which is a state highway; that Washington is the principal truck route East and West; that an origin-destination check can be made by pasting a sticker on the windshield and then counting vehicles with stickers passing a designated point; that this could be done to determine whether Washington Boulevard is carrying traffic from a specific point near the edge of the city through the underpasses;

That, from observation, there does not appear to be any difference in the use made of Washington Boulevard with respect to the amount of truck traffic, from the use made of the state highways (Tr. p. 298).

Mr. Jenkins recognized that the railroads receive an advantage where the hazard to the train is eliminated by separation of grades (Tr. p. 325); said that it is difficult to pass on the cost of grade separations by increasing railroad rates, because if such rates were increased the trucks would have a competitive advantage and traffic would be diverted to them (Tr. p. 327); that the railroads receive benefits from eliminating grade separations by eliminating [fol. 35] delays; the delay factor can be measured as it was in the *Goshen Junction* case, pursuant to the Johanson formula developed in a textbook and showing the material value upon a delay to highway traffic (Tr. p. 332);

That railroads should be given priority at grade crossings because highway traffic is continuous whereas railroad operation is relatively infrequent (Tr. p. 334), and because railroads would block more than one intersection if stops were made for traffic signals, and trains are too heavy to accelerate rapidly to clear traffic signals following a complete stop (Tr. p. 336); that highway traffic has increased to such an extent it has "thrown the balance," shifting the obligation now that highway traffic is bigger than rail operations (Tr. p. 337). In figuring benefits derived by railroads from separations, as for instance, in Michigan, maintenance, protection costs, and the costs of accidents were all taken into consideration (Tr. p. 338).

Leo E. Sievert, protestant's witness, the Executive rep-

resentative of the President of Santa Fe, introduced Exhibit 35-RH, which shows the rate of return of Class One railroads and of the Santa Fe, Union Pacific and Southern Pacific, according to figures taken from Interstate Commerce Commission records. The average return for all railroads for a period of 20 years was 3.202; the average for Santa Fe was 3.552 for the same period; for Southern Pacific, 2.735; and for the Union Pacific, 3.2325. During the past 20 years the railroads have not enjoyed a satisfactory, nor adequate, return on their investment (Tr. p. 360);

That there has been a noticeable trend in the handling of freight traffic, in that the short haul, inter-city business [fol. 36] of non-bulky commodities has disappeared from the railroads, and has gone to the trucking industries. Higher rated commodities are being taken increasingly by the trucks, and hauled in interstate commerce (Tr. p. 368). The effect of an extensive grade-crossing separation program, to which the railroads would be compelled to contribute, would be to place a financial burden on the railroad industry and affects its competitive situation (Tr. p. 370);

That the Santa Fe Transportation Company operates in California handling intrastate freight; and subsidiaries have certain interstate operations in other states (Tr. p. 384);

That the price of Santa Fe stock on the market was below 100 in 1941, and was 169 in January of 1951 (Tr. p. 388); that the Santa Fe is a well-operated railroad and has a good future, if it is not hampered with too many costs (Tr. p. 389); that from 1942 onward the financial return to the Santa Fe has been quite a bit greater than during the previous ten or twelve years; this is explained by reason of the war and the Rearmament Program, and is partly attributable to increase in population in this area (Tr. p. 391);

That (according to Mr. Sievert) only benefits that are tangible should be considered in assessing costs in a grade separation project against the Santa Fe; and intangible benefits, such as general welfare of the community, should not be included (Tr. p. 392);

That increased rate of return is not dependent on a new

overpass at Washington Boulevard; it depends on efficiency of the Santa Fe, in operating 13,000 miles of track in 13 states; that Santa Fe's operations could be conducted just as satisfactorily with the existing structures, over Wash- [fol. 37] ington Boulevard, as they could be with any anticipated structures, and there would be no benefit to the Santa Fe (Tr. p. 394).

Arthur C. Jenkins, on further cross-examination (Tr. p. 403), testified that the benefits theory—of determining the proportion of costs to be assessed to the railroad—is subject to determination arithmetically as to the benefits involved (Tr. p. 410); he also testified, although the total freight handled by railroads is not as great percentagewise as it was, the tonnage handled by the railroads has increased, but it has lagged considerably below the rate of increase of population (Tr. p. 411);

That the railroads have developed larger cars, and more powerful locomotives (Tr. p. 417);

That if the City put in a grade crossing over the tracks at Washington Boulevard, the Santa Fe would suffer a detriment, since a grade crossing presents a hazard—regardless of the type of protective devices there; that motor vehicles may crash even through automatic gates, which are the best type of protection; but the situation as it presently exists is no detriment to the railroad, because the grades are separated now (Tr. p. 420);

That the detriment or corresponding benefit where a grade crossing was eliminated would amount to 4% or 5% of the cost, or a maximum of 10%, assessable to the railroad (Tr. p. 421);

That cities get a considerable proportion of the total return from the gasoline tax which is passed by the State to the cities for street work (Tr. p. 427).

If the Santa Fe were assessed on a benefit basis, it would not make any difference what type of structure was built.

[fol. 38] Under the Federal rule where no crossing is closed in the building of a grade separation no cost is assessed the railroad, nor is there any cost assessed against the railroad where a separation structure is enlarged. Up to 10% may be assessed against the railroad where a grade

separation results in a closing of a grade crossing (Tr. p. 429).

You can calculate the amount of monetary benefit to be derived from a grade separation and the highway user gets the most benefit (Tr. p. 434).

There should be no distinction regarding the amount assessed to any of the parties on the basis of the ability to pay (Tr. p. 442).

When the railroad has an increase in railroad traffic demand that necessitates the building of additional tracks the witnesses benefit theory would place all the cost on the railroad for any additional trackage. Here the benefit being with the highway user, it makes no difference whether the source of funds is the city or any other governmental agency (Tr. p. 443).

The State Gas Tax at 4½c per gallon is divided so that five-eighths of a cent goes to the cities for city streets (Tr. p. 448), the same being allocated on a population basis.

William F. Martins, General Foreman in charge of Bridge and Building Department for the Santa Fe at Los Angeles (Tr. p. 451), testified that in 1914 there was no grade crossing of public streets across the Santa Fe tracks where Washington Boulevard now is. Also, there was no street in the vicinity (Tr. p. 457). This witness was foreman of the work of building the existing underpasses.

[fol. 39] Frank H. Hitchcock, a witness for Santa Fe and the General Claims Agent at Los Angeles, testified that there has been no claim loss on account of accidents at the existing underpasses, and no cost for property damage or personal injuries have been paid by Santa Fe (Tr. p. 458).

A survey of the cost of grade crossing accidents in California from 1947 through the first ten months of 1950 shows that the average accident costs the Santa Fe $163.50 (Tr. p. 459 and 471). This figure takes into account principal payments and legal expenses, not the cost of investigation.

Costs of accidents at crossings comparable to Washington Boulevard which are street grade crossings are shown in Exhibit 37-RH (Tr. p. 461). These four crossings picked at random show no claim cost. Five other crossings considered comparable to Washington Boulevard where there

are grade separations now, were studied for their claim record for five years preceding the construction of the grade separation. Claim costs are shown in Exhibit 38-RH. (Tr. p. 462).

Rural crossings where there is a combination of heavy traffic and high speed result in the worst accidents, in the experience of this witness, who has been in the claim business for 45 years (Tr. p. 464).

The hazard of damage to trains has increased many fold in recent years. Years ago trains seldom struck anything but a horse and buggy and pedestrians. Now tank trucks and heavy vehicles cause disastrous wrecks and derailments primarily due to the increased size and width and character of highway vehicles. However, grade crossing protection [fol. 40] has materially improved in recent years (Tr. p. 465).

There were 1186 accidents from 1947 through the first 10 months of 1950 on the Santa Fe's 1620 crossings (Tr. p. 466).

The average accident with an automobile does not damage railroad equipment. Accidents with trucks, road rolling machines, and commercial-type vehicles do cause damage to railroad equipment (Tr. p. 471).

Busy travelled city street crossings definitely cause considerably less loss from accident than country crossings (Tr. p. 472).

O. L. Gray, General Manager for Santa Fe, testified that there are seventeen scheduled passenger train movements and sixteen to twenty-two freight train movements daily over Washington Boulevard. It is his opinion that Santa Fe will receive no increase in business from enlarging the existing bridges; that, if anything, such construction would enhance the trend for diversion of traffic to the trucks, a definite trend over past years. The present bridges are sufficient for railroad purposes and will remain adequate for the foreseeable future (Tr. p. 474).

It is impossible to pass the costs of a specific project such as this by increasing rates, although the railroads' shippers will eventually have to stand the costs. There are frequent calls for the railroad to contribute to the costs of such

structures in other states. The effect of such contributions is to make it more difficult to meet competition (Tr. p. 476).

Freight trains over Washington vary in content from ten to one hundred cars. Their speed does not exceed fifteen miles per hour (Tr. p. 480).

[fol. 41] There has been substantial increase in business in this area since 1900 freightwise but not passengerwise. Including military trains, Santa Fe trains carry 1,000 to 1,200 persons daily over Washington Boulevard (Tr. p. 482).

Crossing accidents cause considerable expense and delay. For example at Azusa a gasoline truck collided with the Super Chief doing approximately $150,000.00 damage including claim costs, and delayed the train about two hours (Tr. p. 483).

One crossing accident out of twenty-five or thirty may damage a train, the damage usually consisting of damage to foot boards or handholds or ladders. A small proportion of the accidents cause damage to other equipment. Perhaps one out of fifty or sixty accidents may cause a derailment (Tr. p. 489).

Accidents usually cause only a few moments delay (Tr. p. 490).

Fewer trains are operated today than twenty years ago because the *Deisel* locomotives handle more tonnage and more cars; however, the tonnage handled is up (Tr. p. 491).

The present underpasses do not require any repairs, just normal maintenance (Tr. p. 493).

Demand is being made on Santa Fe in another California County for seven or eight grade separations involving eight or ten million dollars (Tr. p. 494).

Donald M. Baker, Installing Engineer, Ruscardon Engineers, Los Angeles, testified to making a traffic count at Washington Boulevard as shown in Exhibits 39-RH, 40-RH [fol. 42] and 41-RH. In these exhibits "I.C.C." indicates trucks or vehicles with a tag indicating they were operating under the Interstate Commerce Commission. Full trailer means trucks with a complete trailer attached. Pick-up trucks and panel body trucks were included in the count of passenger cars. No trucks were counted twice in any column except the total (Tr. p. 501).

Because it was muddy it was difficult to see all of the I.C.C. signs. Also they were on various places on the trucks (Tr. p. 503).

Generally speaking, there was about one truck for every four passenger cars (Tr. p. 503).

Henry D. Lynch, Civil Engineer, actually supervised the truck check. He testified to the difficulty of seeing all the I.C.C. markers. About 1% of the traffic was actually counted as bearing I.C.C. tags (Tr. p. 513).

John M. Terras, Bridge Engineer, Santa Fe, testified that the railroad bridges over Washington Boulevard originally were built to a fourteen-foot vertical clearance and that such bridges do not tend to settle. The Cooper Loading for the Harborline bridge is E56 or 60, that is on a mainline track bridge E65, the latter being the present standard. The Accounting Department depreciates such bridges over a period of fifty years but that does not represent the life of the bridge. Bridges are renewed largely due to obsolescence rather than structural failure and these bridges are good for possibly another fifty years (Tr. p. 522).

[fol. 43] It is stipulated that the railroads mentioned in Exhibits 50, 51, and 52-RH are predecessors in interests of the Santa Fe (Tr. p. 529).

Harry Silk, Jr., Manager of the Metropolitan Transit and Traffic Department, Los Angeles Chamber of Commerce, testified that the committee of that Department concluded that a six-lane roadway with adequate sidewalks and vertical clearance is desirable and that the Chamber of Commerce takes the position that Washington Boulevard is one of the major east-west arteries continuous across the City and County (Tr. p. 532).

John C. Crowley, representative of the League of California Cities, testified and placed a resolution of the League in evidence dated March 16, 1951, Exhibit 53-RH (Tr. p. 538).

George Langsner, East District Engineer in charge of Design in the Los Angeles Metropolitan Area, Division of Highways, testified that there will be a grade separation between the Santa Ana Freeway and Washington Boulevard; that Washington Boulevard is a so-called primary or major highway built to major highway standards (Tr. p. 559).

It is not good engineering practice to narrow a six-lane highway to two lanes or four lanes (Tr. p. 562).

Washington Boulevard carries approximately ten thousand cars and trucks a day. The underpasses under Santa Fe tracks are approximately five miles from the Anaheim-Telegraph-Washington Boulevard crossing (Tr. p. 564). [fol. 44] F. A. Burt, Chief Executive Road Commissioner, Los Angeles County, testified regarding present standards of highway construction and his testimony is not in issue here (Tr. p. 569).

Harold O. Springer, recalled as a witness, testified that the present vertical clearances between the surface of Washington Boulevard and the underpass are 13.52 feet and 13.24 feet (Tr. p. 573). He introduced Exhibit 61-RH and stated that the Cooper Load Rating for the average railroad bridge has been E55. Subsequently in 1925 specifications for steel rail bridges required an E60 rating and by 1943 an E72 rating was recommended (Tr. p. 581). These increases are due to increased loading on the rails themselves and is more costly construction than formerly (Tr. pp. 582, 583). Similarly there has been an increase of load standards for highway bridges in about the same ratio as for railroad bridges (Tr. p. 584).

Hugo H. Winters, recalled, testified that the accidents as shown by Exhibit 28 occur partly because of the tapering of the roadway from 77 feet to the 20 feet underpasses. The exhibit shows all the accidents reported to the police department (Tr. p. 586). A number of the accidents are some distance removed from the underpasses and result from changes in size of the roadway and also from the sharp curves (Tr. p. 588).

Exhibit 62-RH is a land use map in the area of the underpass (Tr. p. 589).

[fol. 45] Memorandum of Points and Authorities—Filed July 24, 1952.

I.

Statement of the Case and the Ruling of the Commission.

The Santa Fe respectfully applies for a writ of review for the purpose of testing the lawfulness of Decision No.

47344 of the Public Utilities Commission dated June 24, 1952.

On June 4, 1948, the City of Los Angeles filed an application No. 29396, with the Public Utilities Commission, seeking authority to enlarge two existing grade separation structures on Washington Boulevard below petitioner's tracks between Soto Avenue and Santa Fe Avenue in the City of Los Angeles. After public hearing, the Commission rendered Decision No. 43374; thereafter both the City [fol. 46] and the Railroad applied for a rehearing which was granted and it is from the decision on rehearing to review which Santa Fe requests this writ be issued. In the decision the Commission authorized the City to construct the enlarged grade separation structures and apportioned 50% of the cost of the structures to the Santa Fe.

Petitioner seeks this writ of review on the ground that the Public Utilities Commission unlawfully, arbitrarily and unreasonably and unconstitutionally exceeded its authority, arbitrarily assessed the amount and assessed an excessive amount depriving Santa Fe of its constitutional rights both under the Constitutions of the United States and the State of California as will be set forth more particularly hereafter.

II.

Summary of the Evidence Considered Pertinent to the Constitutional Issues.

The following is a brief summary of the evidence which petitioner considers is pertinent to the constitutional issues raised herein, bearing in mind that the abstract set forth in the Appendix is a more complete review.

There are two sets of railroad tracks that cross Washington Boulevard approximately 200 feet apart leading to a junction just north of Washington Boulevard. These two sets of tracks cross over Washington Boulevard on railroad bridges constructed in 1914. The eastmost tracks carry the Santa Fe's third district main line to the east and San Diego while the tracks on the west carry Santa Fe's lines to Los Angeles Harbor. These railroad lines [fol. 47] were placed in operation by Santa Fe's predecessor in 1887 and 1888 respectively.

In 1914 these railroad lines consisted of three tracks crossing the area now known as Washington Boulevard at grade. By contract between the City and the Santa Fe the two presently existing underpass structures, each 20 feet wide, were constructed to give the City garbage trucks easier access to the garbage disposal plant. The City and Santa Fe by agreement each paid half the costs. Until 1914 there was no open street at or near the present location of the underpasses.

In 1926 Santa Fe required additional rail facilities over its main line to the east and, therefore, built at its sole expense an additional superstructure for another track over the main line crossing of Washington Boulevard. Thus both underpasses carry two tracks at this date. In 1931 the City of Los Angeles constructed a bridge across the Los Angeles River just east of the underpasses and opened Washington Boulevard as an arterial street from the ocean in the west to Whittier Boulevard east of the City.

The present underpasses carried only local traffic until the Los Angeles River bridge was built in 1931. Since then the traffic on Washington Boulevard has increased to a point where applicant's witnesses state that a 6-lane highway is necessary to carry the traffic, pointing out that the registration of vehicles and population have both increased tremendously in recent years. At the present time Washington Boulevard carries approximately 10,000 vehicles daily through the existing underpasses. The narrowness of the underpass structures creates a hazard, particularly to large trucks which may scrape the sides of the structures and to trucks taller than the vertical clear-
[fol. 48] ance. It is admitted that the evidence is sufficient to support a finding that the underpasses should be enlarged.

Washington Boulevard is described by all witnesses as a primary arterial highway crossing the city and county and is one of the most important east-west streets and highways in the city and county of Los Angeles. The center of gravity for truck traffic in the City of Los Angeles is the intersection of Washington Boulevard and Alameda Boulevard about 4,300 feet west of the underpasses, and from and to which point commercial traffic fans out to the

harbor, the industrial district, and the hinterland. Alameda carries approximately 38% trucks. Washington Boulevard approximately 25%. A number of trucks using Washington Boulevard bear Interstate Commerce Commission numbers and the large trucks using the street are considered to be through trucks from distant cities. Also, it is anticipated that more trucks would use Washington Boulevard when it is widened and improved as planned.

The large existing underpasses would benefit the highway user by decreasing the amount of delay to vehicles, an important if not the most important factor in grade crossing separation projects. When widened Washington Boulevard will be an important feeder for traffic to the new freeways and proposed bus routes and will relieve congestion from parallel streets. It is necessary to build new underpasses higher and wider to accommodate the tremendous increase in the flow of traffic. Also vehicles using highways have become wider and taller and move faster, requiring wider lanes and taller bridges, and particularly is this true where there is a large proportion of trucks mixed with automobile traffic.

[fol. 49] In 1932 the Public Utilities Commission (then the Railroad Commission) authorized the City to construct two 56-foot bridges at the location of these underpasses and apportioned 25% of the cost to the Santa Fe. The City now proposes 90-foot wide underpasses to accommodate 6 traffic lanes.

The Federal Government by a policy memorandum covering federal highways assess railroads with a maximum of 10% of the cost of grade separation structures on the basis of the benefit the railroads receive from the construction of grade separations. Where no crossing is closed or a separation structure is enlarged, the Federal policy is to assess no part of the cost to the railroads on the basis that no benefit is received by them.

Santa Fe's witnesses testified that enlargement of the proposed underpasses would be an actual detriment rather than a benefit, first, because of the increased maintenance costs of larger structures and, second, the improvement of a right-of-way for competitive truck traffic, and third, that the cost of contributing to such construction will make

it more difficult for the railroads to compete with the highway carriers.

The existing underpass structures have an estimated 50 years of remaining life. Prior to 1925 they complied with the then existing engineering standards known as Cooper ratings and were built to the same standard as practically all existing structures. Successively in 1925 and in subsequent years these standards have been increased to provide for heavier railroad loadings and to accommodate increased height of trucks. The uncontradicted engineering testimony is that no repairs are needed to the existing structures and only nominal maintenance is required.

[fol. 50] A railroad shipper and a union official testified in favor of the adoption of a benefit formula so that first, the cost of such structures as the ones herein proposed would not have to be ultimately borne by the shippers, and second, so that the competitive position of the railroads would not be impaired. It was further testified that 19 of the 21 operating Railroad Brotherhoods have passed resolutions in accord.

A consulting engineer compiled an extensive report, Exhibit 29-RH, in which he considered the multiple problems in apportioning costs of grade separation structures. He testified that originally the railroads were constructed over existing highways that handled local traffic. In the early days the railroads were the first long-haul carriers, tended to be monopolistic, and with their ponderous equipment a hazard to horse-drawn vehicles and pedestrians on the highways. Since then population and the use of automobiles and trucks have more than kept pace with the rapid development of inter-city and transcontinental highways. By 1920 the railroads ceased to expand and failed to grow in proportion to the increase in population. In the past 40 years highways have reversed the trend and have expanded over and across the existing railroads and now handle fast cross-country traffic. The types of vehicles have changed from wagon and buggy to huge ponderous trucks of all types. Delay to traffic on the highway has become the principal consideration in eliminating grade crossings with railroads. Grade crossing accidents have diminished in comparison with numbers of vehicles registered as a re-

[fol. 51] sult of better crossing protection and now are a very small percentage of accidents on the highways.

It is possible to figure mathematically the economic values of the benefits to be derived from constructing grade crossing separations. It is a formula in which the cost of delay to motor vehicles and the cost of accidents can be evaluated.

This witness also testified that paying the part of the cost of grade separation structures injures the railroads from a competitive standpoint and it furthers the diversion of transportation business from the rails to the highway. He pointed out that Interstate Commerce Commission reports show that it costs the railroads 23¢ out of each gross revenue dollar to provide for their right-of-way and in contrast that it costs the commercial trucking industry only 3.7¢. Moreover, the reports show that trucks have taken a large portion of the long-haul traffic and nearly all of the short-haul traffic from the railroads.

This witness also traced a trend indicating that before the advent of the automobile the railroads paid nearly all the costs of grade separation and that in more recent years state and political subdivisions and the Federal government have been carrying an increasing proportion of the cost; that states passing recent statutes on the subject have decreased the proportion of the cost to be borne by the railroads to from 10 to 25%. He also pointed out that grade separation structures today are more elaborate edifices made necessary by multiple lane highways and faster [fol. 52] mixed traffic and larger vehicles. His conclusion is that the necessity for separating the grade of highways and railroads is not so much to eliminate the accident hazard as to expedite highway traffic.

Other witnesses testified that the calling upon the railroads to bear a substantial portion of the cost of grade crossing separations would be a heavy burden on the railroads. The rate of return for the past 20 years in relation to the value of railroad investment and replacement costs has not been adequate. The imposition of such costs make it more difficult for the railroads to compete with other forms of transportation. Although tonnage handled by the railroads has generally increased, the number of trains

particularly over Washington Boulevard has not increased due partly to the greater motive power of diesel locomotives and larger cars and longer trains.

Accidents have occurred at the existing underpasses because vehicles, particularly trucks, have struck the sides of the structures and the top. Other accidents near the underpasses have occurred because of the narrowing of the roadway and because of the curvature. However, with the exception of accidents between railroads and tank trucks or large vehicles, trains are seldom derailed and damage to railroad equipment is relatively small. The Santa Fe has sustained no loss and there have been no claim costs for either personal injury or property damage from any accident at the presently existing underpass structures at any time.

[fol. 53] III

The Court Should Exercise Its Judgment on the Law and the Facts in Reviewing the Validity of the Commission's Decision.

The principal issues presented in this matter arise under the Constitution of the United States. Because of this situation the court's attention is directed to the problem that where issues involving the Constitution of the United States in grade separation matters the Supreme Court should exercise an independent judgment upon both the law and the facts. It seems proper that this matter be considered here since this case is considered by the parties and the Commission as a test case.

There are three phases of this problem. The first involves the extent of the review of points of fact involving the Constitution of the United States; the second involves the extent of the review of the findings of fact involving the Statutes and Constitution of the State of California; and the third involves the extent of review of questions of mixed law and fact.

The *first* phase of the problem is that the Supreme Court of the State of California should exercise an independent judgment of the law and facts as to points involving the Constitution of the United States in reviewing the validity

of the Commission's decision. This is a requirement that arises under the due process clause of the Constitution of the United States.

Bluefield Water Works Co. v. Public Service Commission of the State of W. Va. (1922), 262 U. S. 679, 67 L. Ed. 1176;

[fol. 54] *Ohio Valley Water Co. v. Ben Avon Borough* (1920), 253 U. S. 287, 64, L. Ed. 908.

The matter is well summed up in the case of *Lone Star Gas Co. v. City of Fort Worth, Tex.* (1936), 15 Fed. Supp. 171, 176, as follows:

> "As to the question of arbitrariness and unreasonableness, as stated above, the due process clause of the Fourteenth Amendment justifies a complainant in demanding the independent judgment of the court as to both law and facts. *Bluefield Water Works & Improvement Company v. Public Service Commission*, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176."

The review to which petitioner is entitled as to points arising under the Constitution of the United States includes an independent judgment upon both the law and the facts, and this is true whether the action of the Commission is quasi judicial or legislative. Further, this right to an independent review of the facts cannot be limited by a state statute.

American Toll Bridge Co. v. Railroad Com. (1938), 12 Cal. 2d 184, 191-4;

Southern California Edison Co. v. Railroad Commission (1936), 6 Cal. 2d 737, 744, 59 P. 2d 808.

and the above cited cases set forth the extent of the review required by the court.

This independent review of the facts to which petitioner is entitled was clearly stated in *Nashville, C. & St. L. R.* [fol. 55] *Co. v. Walters* (1934), 294 U. S. 405, 415-16, 428, 79 L. Ed. 949, 956, 963, as follows:

> "First. Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the state in

imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, *the Supreme Court obviously erred in refusing to consider them.*" (Emphasis added.)

and

"Second. The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass."

Compare Section 1760 of the Public Utilities Code (added to the Public Utilities Act of 1915 in 1933 as the last paragraph of Sec. 67, stats. 1933, Ch. 442, pp. 1157, 1158), and *Southern Calif. Edison Co. v. Railroad Com.* (1936), 6 Cal. 2d 737, 750.

The *second* phase of this problem is that the Supreme Court of the State of California need only determine as to points involving the Constitution of California that substantial facts support the validity of the Commission's Decision.

Section 1757 of the Public Utilities Code (and Public Utilities Act of 1951) was based on former Section 67 [fol. 56] of the Public Utilities Act of 1915. Section 1757 in part is as follows:

"* * * The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. * * *"

The extent of review by the Supreme Court of decisions of the Public Utilities Commission in matters not involving the Constitution of the United States as well stated in 2 Cal. Jur. 2d 382, as follows:

"* * * the public utilities commission's findings of fact are, like the findings of a court or general verdict of a jury, final only when supported by substantial evidence." (See cases cited at Note 14.)

and again at 2 Cal. Jur. 2d 381:

> "it has been repeatedly ruled that where a finding made by the commission is without supporting evidence, it is an abuse of discretion, and an award based thereon will be annulled by the courts."

See also:

Southern Pacific Co. v. Railroad Com. (1939), 13 Cal. 2d 125.

The *third* phase of the problem is that the Supreme Court of the State of California should exercise an independent judgment to ascertain that the questions of law have been correctly decided in questions of mixed fact and law. This [fol. 57] matter requires a study of the facts and was well summed at 2 Cal. Jur. 2d 372, as follows:

> "* * * In general, where what purports to be a finding on a question of fact is so involved with and dependent on questions of law as to be in substance and effect a decision of law, the court will, in order to decide the legal question, examine the entire record, including the evidence if necessary.
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> * * * * * * * * *
>
> "The most important class of questions of mixed law and fact are those arising upon so-called issues of constitutional or jurisdictional fact, or fundamental facts bearing on constitutional or jurisdictional issues. With respect to constitutional facts, for instance, the courts may consider the evidence presented in a proceeding in order to determine whether an administrative decision or order violates any right of a party under the state or federal constitution, even where the proceedings are before an agency enjoying special constitutional status whose determinations are otherwise subject only to a limited review. The rule that the administrative determination of facts bearing on constitutional rights of a litigant, even though supported by evidence, is not conclusive on the court, and that the court will exercise its own independent judgment on the evidence, is typically applied where rates

found by an administrative authority to be reasonable are attacked as confiscatory and the court makes its own determination as to the value of the property involved."

[fol. 58] IV

The Decision Is an Excessive, Arbitrary and Unreasonable Assessment of Costs in Violation of the Santa Fe's Constitutional Rights.

In making its order in Decision No. 43744, the Commission deprived Santa Fe of its constitutional rights to substantive and procedural due process and equal protection of the laws and required it to pay a large sum of money, taking its property, without just compensation in violation of the Constitution of the United States, Fifth and Fourteenth Amendments and in violation of the California Constitution, Article I, Sections 13 and 14.

The protection of the Fourteenth Amendment to the Federal Constitution against orders requiring railroads to eliminate grade crossings at unreasonable expense is real, and not to be lightly regarded.

Lehigh Valley Rd. Company v. Board of Public Utility Commissioners (1928), 278 U. S. 24, 73 L. Ed. 161, 167.

1. The Safety Factor—There Is no Substantial Evidence in the Record to Support the Decision Apportioning so Large a Percentage of the Costs Upon the Railroad.

In the instant case the authority of the Public Utilities Commission is derived from the California Constitution, Article XII, Sections 22-24, and from the Public Utilities Code, see Sections 1202 and 1214. The Commission's authority is not absolute. The Commission must not and cannot constitutionally assess any proportion of the costs of a grade separation to the railroad arbitrarily or unreasonably or simply because in the exercise of its police power it is able to say that to some extent or to any extent public safety requires the construction of larger under- [fol. 59] passes. Exercise of the police power must be devoid of oppression and must not amount to an improper or arbitrary infringement upon constitutional rights.

5 Cal. Jur., Sec. 106, p. 695.

In *Archer v. City of Los Angeles*, 19 Cal. 2d 19, at pages 23-24, it is said:

> "The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals. (*Gray v. Reclamation Dist.*, 174 Cal. 622.) (Citing cases.) In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. (*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (43 Sup. Ct. 158, 67 L. Ed. 322); *Chicago B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226 (17 Sup. Ct. 581, 41 L. Ed. 979).)"

The police power is subject to constitutional limitations therefore: One, that it may not be exerted arbitrarily or unreasonably; two, that when particular individuals are singled out to bear the cost of advancing public convenience, the imposition of costs must bear some reasonable relation to the evils to be eradicated or the advantages to be secured

Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. Ed. 949, at pages 955 and 963, respectively.

In the instant proceeding the "evil to be eradicated" is the danger that trucks which have become wider and taller may hit the underpasses; the "advantages to be secured" are elimination of delay to vehicular traffic.

[fol. 60] If the Commission's decision is based upon its police power its order is on its face an arbitrary exercise of that power. It fixes the railroad's share of the cost in round figures, 50%. Nowhere either in the evidence or in the Commission's opinion is there any indication that the Commission figured this percentage on any logical or reasonable basis; from all appearances it was literally plucked out of the air as the Commission's idea of rough justice, based upon unknown standards, outside the record, rather than upon up to date technics of calculating the value of benefits of accident elimination. If the Commission's decision is to have a rational basis the value of promoting

public safety can be calculated with a reasonable degree of accuracy. The Commission did so calculate in its decision in the *Goshen Junction* case (1933), 38 C. R. C. 380, wherein the sum apportioned to the railroad in a proceeding resulting in closing of not one but two grade crossings was arrived at by capitalizing an amount measuring the annual benefits and privileges received by the railroad on a 6% basis. The result of this calculation was to charge $15,000.00 to the railroad and $340,000.00 to the public authorities (Tr. p. 296).

The Santa Fe respectfully urges the Court to consider that this monetary value can be figured on a reasonable mathematical basis, as the Commission did in the *Goshen* case, *supra*, and need not be arbitrarily guessed or assessed in round percentage figures (see Tr. pp. 198, 201, 269, 298, and 410). Moreover, the Public Utilities Commission has sizeable funds (see Budget Act of 1950, Statutes of California, Chapter 2, p. 310, and Budget Act of 1951, Statutes of California, Chapter 1920, p. 2706) appropriating $2,710,602.00 and $2,687,791.00 respectively for support of [fol. 61] the functions of the Public Utilities Commission, and the Commission has numerous engineers who can calculate and place in evidence the reasonable value of the safety factor in grade crossing separation cases, particularly where the only substantial evidence shows, as in our case, that accidents at the underpasses have cost the Santa Fe nothing whatever. (See Annual Report of the Public Utilities Commission for July 1, 1949, to June 30, 1950, page 97, which states that during the year 264 applications have required investigation and reports by the Engineering Section of the Transportation Department and that among the matters covered are authorizations for the construction and protection of grade crossings and grade separations.)

It is obvious, therefore, that there is no necessity for an arbitrary determination of the amount, if any, which should be assessed against the railroad. On this particular phase of the problem petitioner submits that the imposition of 50% or even a smaller percentage does not bear a *reasonable* relation to the "evils to be eradicated" or the "advantages to be secured" in the existing situation. In 1914 when the underpasses were constructed they were safe for every-

one. Since then the Santa Fe has done nothing in any way to create any hazard at the underpasses below Washington Boulevard. There can be no collision between a train and any vehicle using Washington Boulevard. Admittedly the underpass structures have become inadequate for vehicular traffic on Washington Boulevard and because of faster traffic, more traffic, and larger, wider, and higher trucks there is danger that trucks may scrape the sides of the underpass structure, but the change in the use of highway and in the types of vehicles using it and faster traffic have created this danger, not the railway.

[fol. 62] The City has argued to the Commission that the railroad has a continuing obligation, even though the grades are now separated, to help to provide a safe crossing, and admittedly the early cases so hold. But just as in the *Nashville* case, *supra*, facts and circumstances alter responsibilities and reasonable application of police power in 1920 becomes oppressive and unreasonable under changed conditions in 1952.

Before assuming therefore that the Santa Fe should be assessed a large proportion of the costs of larger structures, reasonable consideration should be given to the following factors as well as to others presented herein:

(a) During the past several years the safety factor has materially changed, and in accordance with the change there should be a shift in the responsibility. Thus 40 years ago grade crossing accidents involved striking a pedestrian, a horse, a wagon, or buggy, usually without damage to the railroad or injuries to its employees or passengers. The situation in 1952 is altogether different. The immense and heavily loaded trucks and trailers, inflammable tank trucks, rolling cement mixers, and other heavy equipment, move on our highways and across railroad tracks several times as fast as the horse, and on fortunately rare occasions have caused considerable damage to trains and personnel. The situation is such that the railroad requires protection from the traffic on the highway, because of conditions brought about by changes in highway traffic.

(b) Enlarging the grade separation structures on Washington Boulevard is tantamount to creating a brand new highway across the railroad. The record shows that when-

ever railroads have required new tracks across existing highways, the railroads have paid the entire costs of such [fol. 63] expansion. The Commission's decision requires the railroad to contribute half the cost of an expanding highway system even though the tracks were originally built across open country, and in 1914 the railroad voluntarily paid half the cost of the existing underpasses. It is as unreasonable as though 50 years from now the Santa Fe will again be asked to contribute to an even larger structure, assuming that the trend of highway development continues and that 50 years hence greatly increased highway traffic and larger vehicles find even a 6-lane roadway inadequate.

(c) Examination of Exhibit 29-RH and the testimony of various witnesses (Tr. pp. 457, 489, 586) shows that crossing protection devices have in recent years cut crossing accidents to a very small percentage of highway accidents and that crossing accidents generally have not constituted a heavy financial burden to the railroads. Insofar as the safety factor is concerned, safety can be accomplished even at grade crossings at much less cost, by installing recently perfected flashing lights or automatic crossing gates. Grade separation construction is tremendously expensive and today can be justified only where economic factors involving delay to traffic on the highway warrant huge expenditures. As Justice Brandeis says in the *Nashville* case, *supra*, train movements are few—highway traffic continuous, and the delay factor has assumed primary importance in the problems today.

(d) The existing structures are completely adequate for railroad purposes. About the same number of trains cross Washington Boulevard as in 1914, and the only need for wider and higher underpass structures is to accommodate highway traffic, a portion of which is competitive with the railroad.

[fol. 64] 2. Assessment of Costs on the Basis of Benefits.

If the Commission's authority to assess a part of the costs to the Santa Fe is based upon the *benefits* conferred upon the Santa Fe, because as the Commission says in its order, the Santa Fe can operate longer trains without experiencing delays, without hazard of crossing accidents,

and the use of a new bridge to replace an old one (see Decision No. 47344, p. 18), the assessment so founded must be made within constitutional limits. The railroad is entitled to *just compensation* for any imposition to pay such costs. (United States Constitution, Fifth Amendment; California Constitution, Art. I, Sec. 14.) The Commission's finding that the proposed improvement is "not without benefits to the railroad" discloses the *de minimus* character of the benefits and the lack of substantial evidence to support an assessment of 50% of the costs on this basis. Compare studies made in other states where the value of a grade separation resulting in closing a grade crossing has been calculated to average 4 to 5% of the cost of the structure (Tr. 421, p. 60; Ex. 29-RH). The evidence is uncontradicted that the present structures over Washington Boulevard will permit the Santa Fe to operate long trains without experiencing delays and without the hazard of grade crossing accidents and are entirely adequate for railroad purposes (Tr. pp. 99, 384, 474, 493). At page 18 of the Decision, the Commission finds that the bridges are 75% depreciated, but there is no foundation in the evidence for any such finding. The evidence, on the contrary, is that these bridges, built in 1914, are useful for another [fol. 65] fifty years; and that such bridges if to be replaced, will be replaced then because of obsoleteness rather than because of structural deficiency (see testimony of Mr. Terrass, Tr. pp. 514-521). In fact the substantial evidence is uncontradicted that the proposed structures will place upon the Santa Fe the detriment of increased maintenance costs (Tr. p. 99); that construction of the proposed structures is an improvement of the City's major east-west truck route, cross city and cross country (Tr. pp. 82, 113, 115, 140, 291); that such improvements generally have resulted in diverting traffic from the railroads to the competitive highway carrier system; also that charging the railroads with such improvements places the railroads in a weaker competitive position with the highway carriers (Tr. pp. 368, 474, 204, 253).

In any event, if there are benefits to be derived by the Santa Fe from the construction of larger underpasses the value of such benefits can be and have been computed with

reasonable certainty (Tr. pp. 198, 269, 410). Here again, the Commission should capitalize the value of such benefits as it did in the *Goshen Junction* case (1933), 38 C. R. C. 380. It should also calculate the value of the benefits received by the users of the highway, in accordance with the Johansing Formula referred to in the record (Tr. p. 218).

Any failure on the part of the Commission to assess benefits upon a reasonable basis condemns the assessment as the taking of property without just compensation in violation of a well-known principle of constitutional law:

> Although an individual taxed may receive no benefit and indeed suffer detriment, any so-called *assess-*
> [fol. 66] *ment* for public improvements laid upon particular property owners are ordinarily constitutional only if based upon *benefits* received by them.
>
> *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 79 L. Ed. 949, 953;
>
> *Connecticut Ry. & L. Co. v. City of Waterbury* (Conn. 1941), 18 A. 2d 700 (benefits assessed against a property owner for a public improvement may not be greater than the benefit conferred and must be a special pecuniary benefit as distinguished from general benefits to the public at large);
>
> *Cf. Northwestern Pac. R. R. Co. v. Superior Court* (1949), 34 Cal. 2d 454, 211 P. 2d 571.

The Nashville Case

Petitioner recognizes the implication of earlier decisions in these grade separation-cost apportionment cases but in 1935, the Supreme Court of the United States in the *Nashville C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949, took a new look at the tendency toward assessing railroads a blanket 50% of the cost of grade separation improvements and condemned one such assessment as arbitrary under the facts of that case. In that case suit was brought by the railroad challenging the constitutionality of a Tennessee Statute requiring railroads to pay one-half the cost of separation of grades. The Commission of the State of Tennessee had ordered the

railroad to construct an underpass for a proposed state highway. It was concluded that the State may under its police power impose upon a railroad the whole cost of eliminating a grade crossing or such part thereof as it deems appropriate but the railroad contended that to [fol. 67] impose upon the railroad one-half the cost was, under the circumstances, arbitrary, unreasonable and in violation of the Fourteenth Amendment. The trial court held that the order and statute as applied were arbitrary, unreasonable and void. The State Supreme Court declined to consider the special facts which the railroad contended showed the order to be arbitrary and held that the statute was constitutional.

The United States Supreme Court reversed the decision holding that the facts of the case could render the statute unconstitutional, observing that the statute when enacted, might become invalid by change in the conditions to which it applied, stating that the police power may not be exerted arbitrarily or unreasonably. Justice Brandeis, who wrote the opinion, pointed out that the charge of arbitrariness was based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles, by changes in the character, construction and use of highways and in the occasion for elimination of grade crossings, etc. He stated:

> "The railroad has ceased to be the prime instrument of danger and the main cause of accident. It is the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal-aid system, Tennessee highways were built under the direction of the county courts, and paid for out of funds raised locally by taxation or otherwise. They served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of [fol. 68] grade separation. Then it was reasonable to impose upon the railroad a large part of the cost of

eliminating grade crossings; and the imposition was rarely a hardship. For the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed, for the rail operations are few, those of motor vehicles very numerous."

And it was observed:

"While the railroad, the sufferer from the construction of the new highway, is burdened with one-half of the cost of the underpass, the owners of trucks, busses and others, who are the beneficiaries of its construction, are immune from making any direct contribution toward the cost."

At page 963 the opinion states:

"The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the [fol. 69] imposition upon it of one-half the cost of the underpass.

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that

a duty to provide * * * the particular convenience rests upon it. (Citing cases.) These were the authorities relied upon by this Court in Chicago, St. P. M. & O. R. Co. v. Holmberg, 282 U. S. 162, 167, 75 L. Ed. 270, 273, 51 S. Ct. 56, where it held that to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. (Citing cases.) And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. (Citing cases.) While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; (citing cases) so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. (Citing cases.)"

[fol. 70]

V.

The Commission's Decision Fails to Find Ultimate Facts on Material Issues, Makes Findings Not Supported by Any Substantial Evidence and Other Findings Contrary to the Evidence, Thus Denying to the Santa Fe Its Constitutional Rights to Substantive and Procedural Due Process.

A. Section 1757 of the Public Utilities Code provides in part:

> "The findings and conclusions of the Commission on questions of fact shall be final * * * Such questions of fact shall include ultimate facts * * * "

The interpretation of the above statutory enactment must be considered in conjunction with the authorities cited in Section 3 of the brief, *supra*.

The above section in the Public Utilities Code must be read with the language in the case of *Nashville, C. & St. L. R. Co. v. Walters* (1934), 294 U. S. 404, 428, 79 L. Ed. 949, 956, where in matters that involve the Constitution of the United States, the court said:

> "First. Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railroad one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them."

Likewise a state statute cannot deprive a party complaining of an infringement of its rights under the Federal Constitution of an independent review of the law and facts by a judicial tribunal when the order or decision of [fol. 71] the Commission is challenged. (*American Toll Bridge Co. v. Railroad Com.* (1938), 12 Cal. 2d 184, 191.)

Conspicuously absent from the Commission's decision is any finding as to the benefits to be received by the City and the traveling public represented by the City from the proposed project. The evidence is uncontradicted that delay to highway traffic is extremely important. (See Tr. pp. 85, 197, 218, 246 and Exs. 27 and 29-RH.) The City's witnesses expressed the view that it was imperative the street be widened under the Santa Fe tracks to provide for greater traffic flow and to relieve congestion from Washington Boulevard and parallel streets. There is entirely wanting in the decision any findings as to the proportion each party would benefit from the project.

B. In *Southern Pacific Company v. R. R. Comm.* (1939),

13 Cal. 2d 125, 127, it was pointed out that the statutory requirements as to "findings" to be made by the Commission are practically identical with those contained in the Workmen's Compensation Act, and that where findings are made without evidence the courts will annul and set aside the decision and order of the Commission.

Further there must be subordinate findings supported by the evidence to support the ultimate finding of the Commission (see Pub. Util. Code, Sec. 1757).

The Commission's finding that the proposed widening of the boulevard is to meet local transportation needs and that the City's contribution must come entirely from local funds (p. 17 of the Decision) is wholly without foundation in the evidence. The City's witness, Mr. Winter, testified that Washington Boulevard is an important cross city and [fol. 72] cross county highway; that it carries heavy truck traffic, and will connect with the Santa Ana Freeway (Tr. pp. 38, 39, 82, 84). The City's witness, Mr. Dorsey, testified that the intersection of Washington Boulevard and Alameda Street, about 4,300 feet from the underpasses, is the focal point for truck traffic; that large trucks using Washington Boulevard are inter-city traffic; that approximately 26 percent of the traffic on Washington Boulevard is truck traffic and that if Washington Boulevard is improved as proposed in the instant proceeding, many more trucks will use Washington Boulevard (Tr. pp. 29, 110, 113, 140, 144).

Santa Fe's witness, Mr. Jenkins, pointed out that Washington Boulevard carries a heavier proportion of truck traffic than the state highways in California and that it is the principal east-west truck route through the City (Tr. pp. 291, 298).

With respect to the finding that the City's contribution must come entirely from local funds, the record discloses that there are gas tax funds apportioned to the City by the state which are made available in millions of dollars for improvement of city streets (see Ex. 29-RH, table A-19; Tr. pp. 208-209, 427). Of course, the source of funds has nothing to do with the authority of the Commission to apportion costs:

> *Chicago B. & C. R. Co. v. Illinois Commerce Commission* (Ill. 1951), 101 N. E. 2d 92, 95 (holding

> that the Commission's decision placing the entire cost of automatic flashing light signals on the railroad was an arbitrary exercise of the police power and that the Commission's statement that "the village of Keysport does not have surplus funds" does not in any manner properly adjust [fol. 73] and settle the question of benefits to the diverse interests of the railroad and other public authorities concerned).

The Commission's finding that the existing bridges are 75 percent depreciated is contrary to the evidence, the only evidence being that the bridge still has fifty years of useful life and requires only normal maintenance.

In *Southern Pacific Co. v. Railroad Comm.* (1939), 13 Cal. 2d 125, 128, in quoting from a text the court said:

> "* * * 'where such findings have been made without any evidence to support them, the award, will of course, be annulled.' "

and then stated:

> "Although in the instant matter, in effect, the commission contends that regardless of the strength of evidence presented by the petitioner, and even in the absence of any evidence introduced to the contrary, the commission has the right to disregard the evidence and decide the issue according to its own concepts,—as a conclusion from the foregoing authorities it becomes apparent that the Railroad Commission has no greater authority than has the Industrial Accident Commission on questions of fact; and where, as here, all the evidence supports the petitioner's contention, and none has been adduced in opposition thereto, the ruling of the commission amounts to the making of an order by the commission without any evidence in support thereof."

Thus the issue is squarely presented that the Commission does not have "the right to disregard the evidence and decide the issues according to its own concepts," that is, allocate the costs on a 50% basis. The Commission

must base its decision and order on substantial evidence, yet it did not do so in this matter.

[fol. 74] VI.

Adoption by the Commission of a 50% Formula in Grade Separation Cases Imposes an Unconstitutional Burden on Interstate Commerce.

In the case of *Erie Railroad Co. v. Board of Public Utility Commissioners* (1920), 254 U. S. 394, 65 L. Ed. 322, 334, the court, involving a grade separation apportionment of costs, stated in dicta as follows:

> "If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, * * * If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

After the *Erie* case, the railroads did abandon many of their lines and branch lines that were unprofitable. In some instances, the railroads actually abandoned lines rather than pay the enormous costs involved in grade separations. With this background in mind, the reasons for the adoption of the National Transportation Policy in 1940 can be more readily understood. The Act of September 18, 1940, Chapter 722, Title I, Section I, 54 Stat. 899, amended the Interstate Commerce Act by inserting before Part I thereof the following provision entitled "National Transportation Policy." This new policy is as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered [fol. 75] as to recognize and preserve the inherent advantages of each; *to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue prefer-

ences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —*all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.* All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Emphasis added.)

Thus, the court is faced with a specific change in policy, adopted in view of the existing body of the law which includes of course the above-quoted *Erie* case. It is submitted it is no longer the doctrine of this government that the railroads should quit if they cannot meet the high costs of grade separations where a large proportion of the costs are allocated to the railroads. On the other hand, Congress has stated it is the policy of this government to preserve a national transportation system by rail to meet the needs of commerce of the United States and of the Postal Service and of the national defense. It is further provided in the [fol. 76] National Transportation Policy that it should be recognized that the transportation services promoted should be economical, and that sound economical conditions in transportation should be fostered.

The Supreme Court of the United States in 1947 in *Schwabacher v. United States*, 334 U. S. 182, 92 L. Ed. 1305, 1313, said in discussing the "National Transportation Policy" in the "Interstate Commerce Act":

"* * * This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' Seaboard Air Line R. Co. v. Daniel, 338 U. S. 118, *ante*, 580, 68 S. Ct. 426."

See also:

Interstate Commerce Commission v. Parker, 326 U. S. 60, 89 L. Ed. 2051.

The instant decision must be considered in connection with other grade crossing separation projects in California, and in other states, and the evidence shows that the Santa Fe operates in thirteen states and is called upon by other states and their political subdivisions to contribute toward grade separation construction. The evidence shows further that in California alone it would cost two and one-half billion dollars to separate all the grade crossings in the [fol. 77] state and that in one county of the state the Santa Fe has recently been called upon to contribute toward the construction of eight such projects. It is reasonable to conclude that as automobile and truck registrations mount and highway construction doubles and trebles as it has in recent years and, as motorists chaff at delay, the pressure for new grade separations will increase. It is also reasonably apparent that imposition of costs on the railroads based upon a 50% formula to build very many of the new expensive grade separation structures would be a very great burden on any institution including the railroad industry. At some point an imposition of charges against the railroad for these projects unrelated to benefits received by the railroad must become a intolerable burden on interstate commerce and it is for the courts to determine at what point the imposition becomes unconstitutional. The case of *Pa. Rd. v. Driscoll*, 198 Atl. 130 (Pa. 1938, Pa. 1939), 9 A. 2d 621, 631, stands for the proposition that if the costs of compliance with the legislative mandate are arbitrary and unreasonably oppressive then the mandate is void.

The Santa Fe submits that at some point the cost of complying with cost apportionment orders will become so oppressive as to unconstitutionally burden interstate commerce, and that when the Commission apportions costs at 50% in the projec here involved, the burden on interstate commerce has become so oppressive as to unconstitutionally burden interstate commerce.

[fol. 78] VII

The Commission's Decision Is an Arbitrary Departure From Its Earlier Decisions and From an Established Trend, Based Upon Changed Circumstances, Toward Assessing Costs on the Basis of Benefits.

The widening of the very same grade separation involved here was before the Railroad Commission in 1932, 37 C. R. C. 784. The Santa Fe opposed apportionment of costs on the ground that it would receive no more benefit from the widened separations, that the widened separations would be a detriment to the railway company in as much as maintenance cost would be increased, and that the railway company should not be required to bear any part of the cost of widening said separations since the portion of the public traveling by vehicle would derive the entire benefit from such improvements. The Commission then considered the matter of direct financial benefits not being the sole test in determining the respective portions which the railway and public should contribute to the cost of such improvement. It reasoned that due consideration should be given to the obligations of each party as well as the benefits derived, but it recognized that the portion of the public traveling by vehicle would receive the greatest benefit from the widening of these separations and so concluded that this class of the public should bear the greatest portion of the cost. One fourth of the cost was assessed against the Santa Fe for a roadway fifty-six feet in width and three-fourths against the City. The time for construction was limited to one year and provision was made for lapse if construction was not commenced within that period. Since the City failed to commence construction within a year, the authorization lapsed and the Commission's order became ineffective.

[fol. 79] This decision indicates that the Commission recognized—even at that time before the benefit theory had been fully evolved—that cost allocations in cases of this sort should be made on the benefit basis applying sound economic doctrines.

The Commission in that case made the above-mentioned apportionment order solely with reference to the cost of

widening the existing structures to provide a roadway of fifty-six feet. The order specifically provided that if the City elected to construct a wider underpass the *entire* additional cost would have to be borne by the City. The pertinent portions of the order read as follows (37 C. R. C. 784, 787):

> "(1) The entire expense of constructing said undergrade crossings, on the basis of a roadway width of fifty-six feet, shall be borne twenty-five per cent by The Atchison, Topeka and Santa Fe Railway Company and seventy-five per cent by applicant.
>
> "(2) In the event applicant elects to construct said undergrade crossings of a roadway width in excess of fifty-six feet, the entire additional cost of such construction over and above the cost of constructing said undergrade crossings of a roadway width of fifty-six feet shall be borne by applicant."

The fact that the City in 1932 suggested a 56-foot roadway and now in 1949 suggests a 90-foot roadway proves the point that the sole cause of any need for a wider roadway is the increase in vehicular traffic.

In the matter of a crossing separation near *Goshen* (1933), 38 C. R. C. 380, the Southern Pacific contended that if the applicant (Department of Public Works of California) insisted upon constructing the proposed separation when it had not been shown that the economic benefits [fol. 80] justified the substantial expense of a separation, any assessment upon the company should be limited to the direct benefits to be derived therefrom in the way of decreased operation expense resulting from the elimination of maintaining the existing grade crossing and protection. The Commission did not fully agree with this contention but pointed out that in allocating costs "we are departing from the practice which has obtained generally heretofore of assessing one-half to each the public and the railroad in case of an existing grade crossing." Then it commented as follows:

> "While this procedure has appeared equitable in the past, the tremendous changes in transportation

conditions make necessary a reappraisement of the liabilities of the two parties in interest. The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the rail lines. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic."

The order authorizing the grade separation fixed the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits, arrived at by capitalizing an amount measuring the annual benefits and privileges on a six percent basis. The remainder of the cost was to be borne by the applicant if it elected to proceed with the construction of the separation.

In another case the Commission made an investigation into the adequacy of existing protection at certain grade [fol. 81] crossings of *Alameda Street*, Los Angeles, and the Southern Pacific and Pacific Electric tracks (1939), 42 C. R. C. 59, and found that the installation of wigwag and traffic signals at grade reduced the hazard and congestion, with beneficial results to the railroad and the municipality. It was determined that benefits to be derived by each of the interested parties should be the primary consideration in cost allocation.

The City of Albany applied to the Commission for an order authorizing the widening, altering, improving, and partial relocation of an existing crossing of a public road, highway and street over the tracks of the Southern Pacific Company, connecting two existing portions of Buchanan Street (1941), 43 C. R. C. 440. In apportioning the cost where the grade crossing improvement would require three times as much paving area, the Commission ordered one-third of the expense of new paving to be borne by the railroad and two-thirds by the City and also ordered the City to pay the whole cost of crossing gates and flashing light signals where the crossing was originally intended to reach

a garbage dump but would now be used to reach a race track and highway.

Thus the Commission itself has recognized that conditions have changed to such an extent that a 50% formula is arbitrary and unreasonable. It is interesting to observe the language of the Commission in Decision No. 43374, dated October 4, 1949, superseded by the rehearing order and to note the finding therein at page 8:

> "Thus we are specifically faced with the problem of who shall pay the cost of widening the underpass where the necessity for such widening is not due to the activities of the railroad but rather to the needs of the automotive and pedestrian traffic."

[Vol. 82] Or compare the language of the Commission concerning the same underpass in 1932, 37 C. R. C. 784, 787;

> "There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost."

The Commission has attempted to justify its rehearing order on the ground "this record disclosed that material changes have taken place in conditions at the present time as compared to those in 1932" (see p. 17 of the Decision). This is an irrational observation in view of the uncontradicted evidence that the change is required solely because of the need for expediting traffic on the highway and in no way justifies an imposition of 50% of the costs in 1952 as compared to an imposition of only 25% of the cost for the same project in 1932; on the contrary, the trend noted by the Commission has continued apace toward competitive use of the highways adverse to the railroads and increased needs of the traffic on the highway.

What are these "material changes," to which the Commission refers, that have taken place since 1932:

Exhibit 29-RH traces these material changes from about 1830 to the present time. It shows that the first half of the 19th century was characterized by the turnpike, toll road, and local highway. These were replaced in the second half

of the century by the railroads which were extended aggressively over existing highways and because of their ponderous fast-moving equipment endangered the local slow-moving traffic on the highways.

Until the advent of the automobile and truck, highways were financed by taxation and served as feeder roads to [fol. 83] the railroad passenger station and freight depot. Grade separations to which the railroads contributed not only served to prevent accidents, but also to bring additional traffic and revenue to the railroads.

But toward the turn of the century the hard-surfaced roads, the automobile, and the truck came into being. In 1904 railroad trackage exceeded the length of all surfaced highways. By 1916 railroad mileage ceased to expand and commenced by successive abandonments to decrease. Surfaced highways in 1904 extended 153,662 miles. Since then the highway mileage has increased enormously and now exceeds 3,326,000 miles of which 1,785,000 are surfaced. In California mileage of highways increased from 2,008 in 1920 to 13,994 in 1949, 59.9%. In 1948 approximately 20% of public funds were expended on highways.

Our expanding highway system has, of course, been used, resulting in the continuous expansion of a highway transportation system highly competitive with the railroads. This competition has removed railroads from a monopolistic position in the transportation field and has reduced its earning capacity, during the past twenty years, to 3.2% net return on investment. Truck and bus mileage almost doubled from 1936 to 1948. In California, truck registrations increased from 343,853 in 1941 to 547,208 in 1948. In 1933 there were only 108,189 trucks in California (Ex. 29-RH, Tables 1, 2, 3, 4 and 5). An extensive use of competitive commercial trucks is indicated by the count on Washington Boulevard—one truck to every four automobiles, this figure exceeding the average ratio of trucks on our state highways (Ex. 29-RH, pp. 31-32).

[fol. 84] Let us compare the material changes in the trend of railroad business. In recent years practically all short-haul freight traffic, once enjoyed by the railroads, has gone to the trucks, particularly in metropolitan areas (Tr. pp. 235, 368). The same is true of passenger traffic (Tr. p.

482). A six-lane highway is not necessary to move freight or passengers to the railroad. The wagon and the buggy did that over the dirt roads and unimproved highways. Now in order to accommodate wider and taller trucks traffic lanes have been widened from seven to eleven and twelve feet. Vertical clearance must be increased to fifteen feet to accommodate the largest trucks and multiple-lane highways are necessary to accommodate swift, mixed passenger and truck traffic. Anyone who drives an automobile on our highways can see the shift of transportation from the railroads to the highway box cars. In California in 1938 the railroads enjoyed 27.8% of the gross revenue from the transportation business, commercial trucks 65.9%. By 1949 the figures were 20.9% and 73.7% respectively (Tr. p. 280). These are the material changes since 1932. They show a continuance of the trend noted by the Commission in the *Goshen* case, *supra*, and scarcely justify doubling the percentage of costs apportioned to the Santa Fe.

Other states have recently examined the problem of cost apportionment in the light of changed conditions, namely, Michigan, West Virginia, Indiana, Illinois, Ohio and New York, and have given recognition realistical to the principal that the party that benefits from grade separations should bear the cost (see Chap. 8, p. 68, Ex. 29-RH). Thus in [fol. 85] New York the recently established practice and state policy is to assess no more than 15% of grade separation project costs as the railroad's portion restricting the amount to be paid to benefits derived and wholly excusing the railroad from sharing the cost of grade separation projects on state throughways and on arterial routes in cities.

Federal practice as expressed in General Administrative Memorandum No. 325, of the Public Roads Administration, dated August 26, 1948, Exhibit 20, would require no payment by the railroad in the instant case, recognition being given to the fact that there are no appreciable benefits to the railroad from enlarging an existing grade separation.

It is interesting to contrast the decision of the Commission in the instant case with the findings of the Assembly Interim Fact-Finding Committee on *Tideland Reclamation and Development in Northern California, Related Traffic*

Problems and Relief of Congestion on Transbay Crossings, a report on the Railroad-Highway Crossing Problem in California, published by the Assembly of the State of California in May, 1951. The following are excerpts from this document. From the letter of transmittal to the Speaker of the Assembly is the following excerpt (p. 6):

> "From the testimony presented at the hearings it would appear that the pressure for increased grade crossing separations is out of proportion to the accident hazard but that it derives more from irritation of an increasing driving public over delay factors. [fol. 86] If a state-wide railroad-highway crossing program is undertaken, that the benefit-cost ration be seriously considered as the basis for determining (a) justification for separations (b) priorities."

The following excerpts are taken from the report itself: Page 10:

> "The accident factor, or hazard, while frequently mentioned in hearings and public demands for separations, does not appear alone to be sufficient justification for the construction of separation structures. Studies of the Public Utilities Commission and others, indicate that, in general, safety can be obtained much less expensively by use of modern protective devices."

Page 10:

> "Over the last half-century there has taken place a gradual but marked change in public policy with respect to the responsibility of the railroads for costs of crossing separation. Early in the century the railroads paid the major share of the cost of many separations; probably this was in part due to the prevailing public attitude regarding responsibility for accidents and the belief by the railroads themselves that appreciable although intangible benefits accrued from the reduction of such accidents."

Page 12:

"Inasmuch as grade-crossing accidents are sporadic, and since even in some cases where the demands for separation are great, the number of accidents are relatively few, it is suggested that the estimate of benefits due to accident elimination be placed on an actuarial basis. In other words, by use of experience data on [fol. 87] the potential accident hazard, taking into account the rail and highway traffic, physical crossing factors, etc., the probable (average) accident frequency would be determined and the potential annual cost estimated therefrom."

Page 14:

"Summary of Conclusions.

f. It would be difficult to justify many, if any, separations on the basis of accident frequency alone.

g. The demand for grade separations appears to stem largely from public irritation with delays.

h. The share of the railroads in the cost of grade separations has been declining over the years to a point where such projects may have to be financed largely from public funds.

i. The concept of sharing of costs by participating agencies on the basis of relative benefits appears to be gaining acceptance.

k. If a state-wide grade separation program is undertaken, it is recommended that the benefit-cost ratio be seriously considered as the basis for determining (i) justification for separation, (ii) priorities.

l. If a grade separation program is undertaken on a benefit-cost ratio basis, it will be necessary to obtain considerable information on delay factors at crossings."

Page 20:

"A complete separation program that would provide for the elimination of all grade crossings on main and branch line railroads in this State would involve an expenditure of *approximately two and one-half billion*

dollars." (From 1949 report of the Public Utilities Commission.)

[fol. 88] Page 22:

"It is of interest to note that in these analyses, as in numerous others, the losses due to delays tend to overshadow the loss due to accidents at major crossings for which separation can be economically justified" (Comment on special 1950 studies by the Public Utilities Commission.)

Page 31:

"It should be obvious from these data that the grade crossing accident picture is steadily improving, and that for the State as a whole, the critical problem lies in other segments of the highway system. For example, if it were practical to completely eliminate all crossing accidents, by grade separation or otherwise, the total number of accidents would be reduced by only a little more than 1 percent."

Page 36:

"Trend in Railroad Responsibility.

Over the last half-century there has taken place a gradual but marked change in public policy with respect to the responsibility of the railroads for costs of crossing separation. Early in the century the railroads paid the major share of the cost of many separations; probably this was in part due to the prevailing public attitude regarding responsibility for accidents and the belief by the railroads themselves that appreciable although intangible benefits accrued from the reduction of such accidents.

By 1930, it was more or less common practice for a railroad and the public agency concerned to share the costs of crossing separations equally, if and when agreements could be reached.

The federal NRA legislation in 1933, under which, in some cases, government assumed 100 percent of the

[fol. 89] cost of a separation facility, markedly influenced public policy regarding participation.

In recent years, the share of the cost of crossing separation work assessed to the railroads has generally been less than 15 percent. The provision of the Federal Aid Highway Act of 1944, to the effect that the devision of costs be on the basis of relative benefits but not in excess of 10 percent to the railroad, has been influential, even though the ruling applied only to separations on the federal-aid system.

It would thus appear that no appreciable funds are likely to be applied, except by public agencies, to crossing separation work, where the purpose is primarily in the interest of highway transportation."

Another impartial agency, the Stanford Research Institute, has studied the problem of cost apportionment. Since the conclusions of this scholarly research organization, like the conclusions reached by the Assembly Fact-Finding Committee, effectively corroborate the railroad's position in this brief, the following quotations from the report are quoted for the court's consideration as a further argument in support of this petition:

(From *The Railroad-highway Grade Crossing Problem*, by A. Kenneth Beggs, Senior Economist, Stanford Research Institute, published by the Stanford Research Institute, Stanford, California, May 1, 1952.)

"Allocating Costs for Grade Crossing Projects.

Conclusions:

1. All grade crossing improvements and eliminations provide joint services or products for motor vehicle users, the railroads, and the general public.

[fol. 90] 2. The costs of grade crossing improvements and eliminations are joint costs.

3. When products or services are produced jointly, their costs are joint and cannot be allocated directly to each product. In such cases, joint costs can only be distributed in accordance with the relative demand for the products or services.

4. The relative demands of the several beneficiaries for the services of grade crossing improvements and eliminations should determine the distribution of the total (joint) costs of the projects among the beneficiary groups.

5. The relative demands of the beneficiary groups should be measured by the relative value of benefits each receives from the grade crossing projects.

6. There is no essential difference in sound principles of cost allocation between (a) grade crossing improvements, (b) separations, and (c) opening and closing of crossings.

7. Any distribution of costs based upon whether the highway or railway was first located at the crossing is not economically sound.

8. Almost all states have statutes either fixing the distribution of costs for crossing projects or vesting the power to do so in a public body.

9. Two significant tendencies have developed over recent years in distribution of the costs for grade crossing projects. First, the percentage of total costs assigned to railroads has declined. Second, state laws are providing increasingly for distribution of costs on the basis of benefits received.

[fol. 91] 10. The United States Supreme Court has formally recognized the validity of distributing costs for grade crossing projects among beneficiary groups on the basis of relative benefits received.

11. The policy of distributing costs for projects undertaken with Federal-aid funds by assigning arbitrary values of benefits to the railroads and to the general public is economically unsound.

12. Prior to 1933, the California Public Utilities Commission assigned costs for projects to the railroads and the public generally on a fifty-fifty basis. Subsequently, the Commission adopted the benefit basis for cost distribution on crossing projects.

13. In 1949, the California Public Utilities Commission gave evidence of reverting to its earlier unsound fixed-percentage basis of cost assignment on grade crossing projects. The particular case reflecting

the change in Commission policy was presented for a rehearing, and no decision on the rehearing has yet been rendered by the Commission." (Page 44.)

The report of the Stanford Research Institute then points out:

"FIXED-PERCENTAGE BASIS NOT SOUND.

"A policy of assigning costs for a grade crossing improvement to railroads (or to other beneficiary groups) on the basis of a fixed percentage of total costs is no more realistic or economically sound than in an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as [fol. 92] between grade crossings. Economic variations relating to various grade crossings are so great that a fixed-percentage basis of cost allocation cannot be economically sound." (Page 47.)

The report of the Stanford Research Institute then went on to observe that:

"THE SUPREME COURT ON COST DISTRIBUTION.

"Legal responsibility of the railroads for assuming costs on grade crossing projects was defined by the Supreme Court in a 1914 ruling based, of course, upon economic conditions in existence at the time.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways * * *(9).

"In another 1914 case, the same court said:

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent

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(9) *Chicago, M., St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 437, 58 L. Ed. 674.

cost to the company as a matter of law is . . . deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court * * * (citing cases) (10).

[fol. 93] "Under these decisions it may be inferred that there is no legal limit to the portion of the total costs for grade crossing improvements and eliminations which may be assigned by public bodies to the railroads. These cases were, however, predicated upon a different set of economic facts than exists today. The requirement for grade crossing improvements in 1914 was a requirement for increased public safety, and not basically a demand for increased free flow of traffic at crossings as is the case today.

"Fruend has made the following observation:

"It is an elementary principle of equal justice that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community. The principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved (11).

"The Supreme Court, which recognizing the regulation of grade crossings as a legitimate exercise of the police power of the states, has indicated that this power is subject to a constitutional limit and that it may not be exerted arbitrarily or unreasonably. The court, in a 1935 case involving allocation of costs of a [fol. 94] grade crossing elimination, took into full account the change in economic conditions since its earlier decisions. It also recognized the necessity for

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(10) *Missouri Pacific R. Co. v. Omaha* (1914), 234 U. S. 127, 59 L. Ed. 160.

(11) Ernest Freund, The Police Power, p. 635.

justifying a burden on the railroads for such costs. The Court said:" (The report quotes at length from the *Nashville* case, *supra*; see Point IV above.)

"This position by the Supreme Court indicates the legal as well as economic necessity for taking into account the reasons for grade crossing improvement and elimination projects, and for considering relative benefits in distribution of costs for grade crossing projects." (Pp. 42-43.)

It was further pointed out in the Stanford Research Institute Report the following under the section heading of:

"Accidents as a Basis for Justification of Grade Crossing Projects.

"Conclusions:

1. Public safety remains the publicized basis of demand for railway-highway grade crossing improvements or eliminations, although the principal basis is actually the demand for greater conveniences in highway travel.

2. If only public safety were involved, adequate protection (except against careless drivers) could be obtained in most instances at less cost by installing highly effective protective devices than by constructing separations.

[fol. 93] 3. Grade crossing accidents in the United States have decreased slightly since 1934 even though there has been an increase in the number and use of motor vehicles on the highways. There has been a marked tendency toward relative improvement in the hazard situation.

4. Grade crossing accidents in the nation as a whole are not overly significant when compared with total highway accidents. Grade crossing accidents in California have in recent years declined in significance relative to total highway accidents.

5. Most highway accidents result basically from increased highway travel, inadequate highway capacity, and lack of caution by motor vehicle drivers.

6. The reduction of highway accidents involves three

approaches: (a) additional safety provisions in vehicle construction, (b) regulation of highway uses and education of users, and (c) design and construction of highways to provide additional built-in safety.

7. Motor vehicle users have a right to receive and public bodies a duty to provide adequate protection and warning devices at railway-highway crossings. If these warning and protective devices are provided but ignored, motor vehicle users should bear the economic responsibility for accidents." (P. 16.)

[fol. 96] CONCLUSION.

In conclusion your petitioner requests that a writ of review issue; and submits that the decision is an arbitrary, unreasonable and unconstitutional exercise of authority by the Public Utilities Commission; that the decision apportioning 50 percent of the costs bears no reasonable relationship to the dangers to be eradicated and benefits to be derived in enlarging the existing grade separations; that the decision is not founded upon substantial evidence but wholly ignores the uncontradicted evidence which justifies the allocation of a very small proportion of the costs, if any, to the Santa Fe; and that the order and decision of the Commission should be annulled and set aside.

Respectfully submitted,

ROBERT W. WALKER,
J. H. CUMMINS,
Attorneys for the Petitioner, The Atchison, Topeka and Santa Fe Railway Company.

[fol. 97] IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

(Title Omitted)

ANSWER TO PETITION FOR WRIT OF REVIEW—
Filed September 12, 1952

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The Public Utilities Commission herewith respectfully submits its answer to petition for writ of review herein.

PRELIMINARY STATEMENT

Petitioner, hereinafter referred to as Santa Fe, attacks Decision No. 47344 (1) of June 24, 1952, issued on rehearing by this respondent Commission in Application No. 29396 of the City of Los Angeles for an order authorizing and requiring the widening, increasing the vertical clearance [fol. 98] and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of said Santa Fe, designating the portions of the work by each of said parties and allocating the cost hereof.

The facts, generally speaking, are not in issue, the disagreement as between the City of Los Angeles and the Santa Fe centering over the fifty-fifty division of the improvement costs allocated by this Commission.

Public hearings, including rehearings, were conducted as to every phase of the situation, all matters were briefed by the parties and oral argument before the Commission en banc was had following the rehearings of December 1950, February and March of 1951.

As the Court is aware, the authority of this Commission to allocate costs in matters of this kind stems primarily from Section 1202 of the Public Utilities Code, from which

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(1) Appendix A herein.

we quote in part: (Section 1202. Exclusive Powers of Commission)

"The Commission has the exclusive power:

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporation and the state, county, city, or other political subdivision affected."

Petitioner, Santa Fe, says that the foregoing decision is arbitrary, unreasonable and unconstitutional and that no costs whatsoever should be allocated to it, because, as it claims, no direct benefits are derived therefrom.

Statement of Facts

On June 4, 1949, the City of Los Angeles filed Application [fol. 99] No. 29396, seeking an order from this Commission which would:

(a) Authorize and require the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line (2) and the main line (3) railroads of Santa Fe.

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(2) This crossing is designated as Crossing No. 2H-0.1-B, and the legal description is as follows: That portion of the right of way, 66 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page 106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

(3) This crossing is designated as Crossing No. 2-143.2-B,

(b) Designate the portion of the work of said construction to be done by Los Angeles and Santa Fe respectively.

(c) Fix, determine, and allocate the portions of the cost of said work which would be borne respectively by Los Angeles and Santa Fe and fix the time and manner of payment thereof, and

(d) Authorize, require or direct such other or further matters and things in connection with said work as might be appropriate.

The said application alleges that the present grade separations are inadequate to meet the present demands of vehicular traffic in that they are too narrow and the vertical clearances are too low.

Santa Fe's answer denies any need for changing the existing grade separation crossings, alleging that the present crossings are wholly sufficient for the needs of the railroad and the convenience and necessity of the public [fol. 100] using the railroad facilities. Also, that since it will receive no benefit from the proposed changes, and since any alleged need for these changes has been occasioned, not by the railroad activities, but by automotive traffic using the highway, it should not be required to bear any of the costs of changes that might be made.

Following public hearing and opening, closing and reply briefs, the Commission on October 4, 1949, issued its Decision No. 43374, in the course of which it stated that the two grade separation crossings then under consideration were constructed in 1914 pursuant to an agreement between the City of Los Angeles and Santa Fe, that the costs were borne one-half by the city and one-half by the railroad, and

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and the legal description is as follows: That portion of the right of way, 100 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Judgment of Condemnation had in Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

that in 1926 an additional superstructure for another track was installed and the entire cost of this was paid for by the railroad.

Similarly, then, as now, there was practically no dispute as to the factual situation, the testimony and exhibits showing the desirability and need of widening the existing underpasses and providing more vertical clearance, the estimated cost of which was not challenged. There, as here, the issue resolved into a question of proper allocation of costs as between said parties.

The City of Los Angeles contends that the railroad should bear that portion of the costs which the existence of the railroad tracks adds to the cost of the proposed improvement. Under this contention it is argued that the City of Los Angeles should pay only that cost of widening the street which it would pay if there were no railroad crossing; all other costs, such as the cost of the bridge and its supports, should be borne by the railroad. The public, it is contended, should not be required to pay additional costs for street improvements when these additional costs are occasioned by the presence of the railroad.

The Santa Fe railroad takes the position that costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed widening since it is now operating satisfactorily and the widening of the street will in no way change these [fol. 101] operations. As a matter of fact, the railroad contends the proposed improvements will actually be a detriment since there will be increased costs involved in maintaining the longer bridge. It contends that the need for widening the underpasses has arisen, not because of any activity of the railroad, but because of the increase in motor vehicle and pedestrian traffic. The record shows that at the present time the separation of grades is accomplished by means of two old underpasses and bridges constructed in 1914, which provide a roadway only 20 feet in width, with no facilities for pedestrian travel. Washington Boulevard has a 90-foot easement up to where it passes under Santa Fe's four tracks.

In 1932 these same parties were before this Commission in a similar proceeding involving the same two cross-

ings (4). At that time the proposal of the City of Los Angeles was to widen the two grade separations so that the roadway under them would have a width of 56 feet. This Commission issued its order authorizing widening of the grade separations and holding that the costs should be borne "25 per cent by The Atchison, Topeka and Santa Fe Railway Company and 75 per cent by applicant." The order further provided that the authorization therein granted should lapse and become void if not exercised within one year from the date thereof. The authorization was not exercised and, therefore, lapsed according to its terms, following a 60-day extension of its effective date (See Appendix "E" herein).

As pointed out by applicant, City of Los Angeles, in its closing brief, we cannot now fail to take note of the material change in conditions at the present time as compared to those in 1932, at the time of Decision No. 25069, supra. The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.

As stated, the foregoing order having lapsed, the applicant, City of Los Angeles, on November 29, 1949, filed a [fol. 102] petition for rehearing of Decision and Order No. 43374, alleging that the decision was contrary to the law and the facts in that it assumed the city to be the principal beneficiary and disregarded the City's right to require the railroad to remove the tracks, that the proposed widening and increasing of the height of the underpasses are necessary in order to remove the railroad's interference with the City's easement for street purposes, which easement allegedly includes the "right to prevent any use of the ground beneath or the space above the easement in any manner which directly or indirectly interferes with the full utilization of such easement for street purposes," that the order of the Commission is in conflict with the Constitution of the State of California, Sections 6 and 8 of Article XI, in that the City "*receives no legal benefit from the* grade separation" since it allegedly has the right to "use its streets unimpeded and unhindered by the exist-

(4) Decision No. 25069, dated 8/15/32, in Application No. 18063, 37 CRC 784.

ence of the tracks," that the formula adopted by the Commission to allocate costs is prejudicial to the City and has been improperly and incorrectly applied, and that the railroad should be required "to pay the full cost of the proposed improvement which is attributable to the presence of protestant's tracks."

Under date of December 2, 1949, Santa Fe likewise filed a petition for rehearing alleging that the Commission's conclusion is erroneous and contrary to law in assessing certain costs to the railroad since the City is the sole beneficiary of the proposed structure, that the proposed structure actually will be a detriment to the railroad, that the "benefit" theory should be followed in assessing costs, and that the assessing of costs to the railroad amounts to a taking of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States and Article I, Section 13 of the Constitution of the State of California.

The Commission's order granting a rehearing was issued March 28, 1950, and public hearings were held thereon before Commissioner Huls and Examiner Syphers on December 27 and 28, 1950, February 2 and 5 and March 19, 1951. [fol. 103] At the request of the parties, the Commission en banc heard oral argument on this matter on November 28, 1951. It was stipulated that all evidence in the prior hearings in this matter, leading to Decision No. 43374, supra, be incorporated into this record which was done.

The legal descriptions of the crossing of Washington Boulevard and (a) the Harbor Branch Line and (b) the main line of Santa Fe have previously been stated in footnotes 2 and 3, p. 3, herein.

The record discloses that Washington Boulevard is a public street extending from the westerly boundary of the City of Los Angeles at the Pacific Ocean in the Venice area, and easterly through the entire breadth of the City and then for a distance of several miles east of the easterly boundary of the City. The grade separations are in the City in an area which constitutes one of the principal industrial districts. Washington Boulevard throughout most of its length has a paved surface of at least 60 feet in width, with a few exceptions where the pavement width

varies from 40 to 60 feet. At the site of the existing grade separations, here under consideration, the roadway narrows down to 20 feet in width, and the vertical clearance is between 13 feet and 14 feet. The City's easement at this point is 20 feet.

The evidence in this case discloses that the rail lines in the area of Washington Boulevard were first turned over to the railroad's operating department on September 23, 1937, for the Harbor Line, and November 28, 1938, for the main line.

Alternative proposals for the construction with attendant costs are as detailed in pages 774 to 776 of Appendix A herein, the estimated over-all total of which preferred plan is $812,765, in conclusion as to which the instant Decision No. 37344 (Appendix A) stated as follows:

> "As previously pointed out herein, the estimated cost of the proposed structures which may be said to be attributable to the presence of the railroad tracks [fol. 104] for two divided span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding."
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> "We further find that The Atchison, Topeka and Santa Fe Railway Company shall bear fifty per cent (50%) of the said amount of $569,355, the costs to be allocated, hereinabove indicated, and the City of Los Angeles the remainder."

ARGUMENT.

There is no statutory requirement that this Commission follow any particular theory of allocation of costs.

Here, as in the past, this "opposite-as-the-poles" position respecting allocating of costs between the railroad and the city has not changed, the former contending that the costs should be allocated according to benefits received and the latter that the railroad should pay that portion of the

total cost which is attributable to the presence of the railroad tracks.

Here, under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing. In the past, a more even division has generally obtained.

The Commission, however, did not subscribe to either contention, but after weighing the evidence in the light of the particular facts and based upon the entire record in the instant proceedings, allocated the cost equally as between Santa Fe and the City, *having previously found that neither party was devoid of benefits but that both would derive benefits from the proposed improvements herein ordered.* In so doing, it gave full consideration to the supplemental showings of the parties upon rehearing whereby the original allocation based upon the original or prior record of 1949 (Decision No. 43374), supra, was discarded and the present 50% allocation to each, based upon the consolidated and subsequently supplemented record, substituted therefor. (See Decision No. 47344, Appendix "A" herein.)

In support of its instant findings, opinion and order we quote the Commission:

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utilities Commissioners*, 1920, 254 U. S. 394; 65 L.

ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161)." (Decision No. 47344, supra.)

"The railroad here contends that the modern development of the law in regard to apportionment of costs in grade separation cases has been toward the allocating of such costs according to the benefits received by the parties involved. In 1932, we are reminded, the same parties were before this Commission in a similar proceeding involving a proposed widening of the same two crossings. (Decision No. 25069, dated August 15, 1932, in Application No. 18063, 37 C.R.C. 784). The Commission's order authorized the widening, and held that the costs should be borne '25 per cent by the Atchison, Topeka & Santa Fe Railway Company and 75 per cent by applicant.' The Commission then said, 'In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived.' However, this record discloses that material changes have taken place in conditions at the present time compared to those in 1932. As we said in Decision 43374, supra, 'The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.'

"Likewise, the railroad relies rather strongly on the decision of the United States Supreme Court in *Nashville, Chattanooga and St. Louis Railway v. Walters*, 1934, 294 U. S. 405; 79 L. ed. 949. There an order [fol. 105] the State Commissioner of Highways requiring the railroad to construct and pay one-half the cost of an underpass at the intersection of the truck and a proposed state highway was held to be arbitrary and unreasonable since the railroad received no benefits from the proposed construction. In that case the highway involved was not designed to meet local transportation needs, but was a state highway intended to

be a link in the national transportation system, and the financing thereof was to come largely through Federal aid. ('Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties.')

"In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds. (Otherwise stated, 'the costs will have to be met without any help from state funds according to this record.')

"In Decision No. 43374, supra, we said 'the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated. While we hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad. Because of the grade separation it can operate longer trains without experiencing delays at this location and without the hazard of grade crossing accidents. The proposed structure would result in a new bridge to replace one that is 75 per cent depreciated, and the new bridge would conform to the recommended 'live loading' (5) standards or Cooper ratings, whereas the present structures do not." (Appendix A, p. 782.)

Additionally, as regards Washington Boulevard, the record amongst other things discloses that the bridge over the Los Angeles River was built in 1931, and it was then that Washington Boulevard became a through street; that prior to that time the existing 20-foot underpasses were adequate, since they were used only by garbage trucks; that the present volume of traffic in the vicinity of the underpass exceeds by five per cent the volume as shown by the original or prior record herein; that traffic which

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(5) Standards of railroad bridges as set out under the specifications of the American Railway Engineers' Association as well as the recommendations made by that body.

normally uses Washington Boulevard is now being diverted [fol. 107] to other streets; that a speed and delay check of this area also indicates the present underpass to be a bottleneck to traffic; that the annual reports of Santa Fe reflect a rate of return of five per cent in 1949; that the executive director of the League of California Cities filed a resolution approving a formula for allocating costs, whereby the municipality would stand that portion of the total costs of building the improvements if there were no railroad tracks involved and that the railroad would bear that portion of the costs occasioned by the presence of the railroad tracks; that Santa Fe stock now sells for about $160 whereas ten years ago it was below $100; that petitioner herein, Santa Fe, has recently started a motor carrier operation in California known as the Santa Fe Transportation Company; that the manager of the Metropolitan Traffic and Transit Department of the Los Angeles Chamber of Commerce stated he believed the traffic in the area to be sufficient to justify construction of a six-lane underpass; that Santa Fe deeds and City ordinances relative to right of way for rail tracks and covering the crossings here involved are of record herein; that the present crossing structures here under consideration are not in accordance with standards recommended by the A.R.E.A.; that Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties; that the preferred plan as herein adopted and prescribed sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter; that the proposed widening of Washington Boulevard is to meet local transportation needs; that the City's contribution thereto must come entirely from local funds; that the railroad has a continuing obligation to participate in the cost of such an improvement; that it is in the public interest to authorize the widening and increasing of the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of Santa Fe and that said Santa Fe should bear fifty per cent (50%) of the aforesaid costs to be allocated

[fol. 108] and the City of Los Angeles the remainder, and that finally as to this latter it found:

"As previously pointed out herein, the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding." (Accordingly, $284,678 allocates to Santa Fe, page 9 of Petition.)

Petitioner, Santa Fe, Rebels Against Any Payments Whatsoever.

Petitioner, Santa Fe, rebels against paying any of the crossing construction costs thus allocated for the Washington Boulevard improvement owing to the asserted lack of accrual of direct monetary benefits to its railroad operations in support of which attitude it relies upon the single case of *Nashville, C. and St. L. R. Co.* v. *Walters*, supra, as to the asserted changed legal basis for its contentions both for this so-called "benefit theory" and its extraordinary demands that this Honorable Court embark upon a *trial de novo* for determination of both the law and the facts surrounding the instant regulatory proceeding. We here wish to disabuse the record of petitioner's inferential implications respecting both of such contentions.

The So-Called "Nashville Case Is Clearly Distinguishable From The Instant Situation.

At the outset it should be stated that the Nashville case is no authority for the inference or contention by petitioner that the law has now been changed so that railroads cannot be required to pay the cost of crossing improvements. In considering that case the following points should be noted:

One.

The Tennessee statute there involved did not confer any discretion upon the Commission, but instead required the railroad in every case to pay one-half of the cost of a grade separation. (79 L. ed. 949, at 954.) Here our statute gives

to the Commission discretion to allocate the costs and does [fol. 109] not purport to make an arbitrary assessment against the railroads.

Two.

In the *Nashville* case the railroad conceded "that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State, may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate." (p. 954.) The claim of unconstitutionality in that case rests wholly upon the special facts shown. Therefore the issue as to what portion of the cost should be borne by a railroad in a grade separation widening and clearance such as we are concerned with in this proceeding was not even an issue in the *Nashville* case. The railroad conceded that in such a case it could be required to pay the entire cost!

Three.

The only point decided by the Supreme Court of the United States was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case. And all the Supreme Court of the United States did was to remand the case to the Tennessee court for consideration of those special facts. The Supreme Court of the United States did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead it expressly stated that it was not making such a determination which was, in the first instance, for determination by the Tennessee court. (p. 965.)

Included in evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider were:

(a) That the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways;

(b) that the decision to build the underpass, its location and construction, was not in any proper sense an exercise of the police power, but rather, as set

forth in the bill of complaint, pursuant to a general [fol. 110] plan of internal improvement fostered by the Congress of the United States in conjunction with the several States to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves;

(c) that the underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, et cetera;

(d) the State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. The aim of that legislation is a "connected system of roads for the whole Nation"; "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole that that offered by the railroads"; to establish "lines of motor traffic in interstate commerce." The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails;

(e) the relief of the unemployment incident to the business depression had been the main incentive for highway construction during the period in which the highway there in question was undertaken and completed;

(f) Lexington, the city there involved, was a rural community of 1823 inhabitants located in a sparsely settled territory. *The construction of the new highway with the underpass was not designed to meet local transportation needs.* It was undertaken to serve as a link in a nation-wide system of highways. State Highway No. 20, as formerly routed, passed through Lexington on Clifton Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected;

[fol. 111] (g) that the present facilities were deemed locally both safe and adequate was attested by the fact

that neither the city authorities, nor any one else, had suggested elimination of that grade crossing; that the grade crossing was to remain unchanged after the new highway was put into use; and that the Clifton Street route was continued to be used for the local traffic;

(h) the underpass was required for a new and additional highway over which State Highway No. 20 was being rerouted, which was to become a part of a Federal-aid route between Nashville and Memphis;

(i) the underpass was prescribed, *not upon consideration of local safety needs*, but in conformity to general plans of the Federal and State highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it was the policy of the Federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. *The requirement of the underpass*, and the payment by the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades *were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass.* (79 L. ed. pp. 956-961.)

In other words, the underpass there involved was constructed in order to qualify for Federal funds, not to meet local traffic needs.

It is obvious that the *Nashville* case is unique and no authority for the contention that the law has now been changed so that railroads cannot be required to pay the cost of eliminating a grade crossing and/or its necessary improvements.

As was stated by the Supreme Court of the United States in the *Nashville* case (at p. 964):

"* * * No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

[fol. 112] This makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' responsibility in connection with grade separations and/or their improvements.

The elimination of a grade crossing when required, not for the purpose of local transportation needs or public safety, but for the purpose of qualifying for Federal aid (as was the situation in the *Nashville* case), is clearly distinguishable from the grade seperation improvements involved in the instant proceeding. In the *Nashville* case we have had a community of 1823 people in a sparsely settled area; here we have a grade crossing in a metropolitan area populated by several million persons. In the *Nashville* case we had the new interstate highway created, leaving untouched the existing grade crossing. In the instant proceeding we have a situation where local transportation needs require the improvement. No new route is being established. The existing city street is merely to be improved to the extent necessary to handle local transportation needs.

In the Nashville case the Supreme Court of the United States expressly recognized the principle of law which we here urge. The court stated (at p. 964):

> "It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost; Chicago, B. & Q. Co. v. Nebraska, 170 U. S. 57, 75, 42 L. ed. 948, 954, 18 S. Ct. 513; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82, that a railroad has no constitutional immunity from having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; Detroit, T. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed 360, 23 S. Ct. 540; Northern P. R. Co. v. Puget Sound & W. H. R. Co., 250 U. S. 332, 63 L. ed. 1013, 39, S. Ct. 474, and that the State may, under some

circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. Northern P. R. Co. v. Minnesota, 208 U. S. 583, [fol. 113] 592, 52 L. ed. 630, 634, 28 S. Ct. 341; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 S. Ct. 43, 20 Ann. Cas. 1206; Chicago M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; Erie R. Co. v. Public Utility Comrs., 254 U. S. 394, 409, 65 L. ed. 322, 333, 41 S. Ct. 169, P. U. R. 1921C, 143. Compare Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 554, 58 L. ed. 721, 725, 34 S. Ct. 364 And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

It should also be emphasized that the Supreme Court of the United States expressly stated, in the *Nashville* case, at page 965:

"We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the State court to hold that the statute and order complained of are arbitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. (Citing cases.) Moreover, since that court held the facts relied upon to be without legal significance, it did not inquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deductible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases.) * * *."

It is our considered opinion that the *Nashville* case, when properly analyzed, clearly supports the proposition that,

in connection with a grade separation alteration such as we are here considering, the railroad can be required to pay the entire cost of the improvement, or such lesser amount as this Commission may deem proper. As was stated by Mr. Chief Justice Hughes in *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. ed. 671, at page 674:

> *"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out, over their tracks, or to carry their tracks over such highways."* (Emphasis added.)

The foregoing, incidentally, answers any contentions of the petitioner as to asserted property right to cross Washington Boulevard and the relative insignificance as to [fol. 114] whether the railroad or street was first placed in use since the record shows the City's 90-foot easement for street purposes at the location here involved.

Allocation of Cost Theories.

Respecting a proper allocation of the costs of grade crossing improvements here involved, we have previously commented as to petitioner's rail "profit" theory and the City's refusal to subscribe to such theory because as, the latter contends, it is impossible to compute rail benefits with any degree of certainty; it completely disregards the legal rights of said city to use its streets free from obstruction or interference; and it further disregards the legal obligations inherent in the operation of the railroad.

The respondent, The City of Los Angeles, has, in brief, stated what it believes to be the only equitable method of allocating costs of grade separation matters giving full consideration to the legal rights of the City and of the Railroad as follows:

> "It is our considered opinion that the proper basis of allocating expenses of a grade separation is to require the City to pay the amount which it would cost the City to improve the city street in the manner proposed if there were no railroad tracks, and to require

the railroad to pay the additional cost resulting from and necessitated by the presence of the railroad tracks. As has been stated:

"* * * The true basis of apportionment of the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement.' (*State of Missouri ex rel. Wabash R. Co.* v. *Public Service Comm.*, 100 S. W. 2d 522, 109 A. L. R. 754; *State ex rel. Kansas City Terminal R. Co.* v. *Public Service Comm.*, 272 S. W. 957.)

"This formula can be applied with mathematical exactness in every case and gives full and proper consideration to both the legal and equitable principles applicable to grade separation."

Similarly, as reflected by the official record herein, the League of California cities by the following resolution sets forth its belief as to the equitable and legal method of [fol. 115] allocating costs of grade separations and improvements thereof, and reading, in part, as follows:

"Now, Therefore, Be It Resolved, that the Board of Directors of the League of California Cities hereby officially goes on record as approving, as the proper formula to be used in connection with the allocation, between a municipality and a railroad, of the cost of a new grade separation, or the improvement of an existing grade separation, the following formula:

(a) Allocate to the municipality that portion of the the total cost which represents the amount which it would cost the municipality to make the necessary improvement to its street if there were no railroad tracks involved;

(b) Allocate to the railroad such portion of the total cost which is occasioned by the presence of the railroad; that is, allocate to the railroad such portion of the total cost as the presence of the railroad enhances the cost of a necessary improvement;

Such formula to be applied in all cases where a city street, as distinguished from a state highway, is involved." (Exhibit No. 53 R. H.)

The Fact That Review In California Is Limited To The Record Before The Commission Presents No Constitutional Infirmity.

Reverting to the second and last contention of petitioner for the asserted right to retry a regulatory proceeding coming from the Commission, where, as here, the statute requires the review to be determined solely upon the record of the Commission and prohibiting this Court from taking additional evidence, we wish to quote the language of the Supreme Court in *Alabama Public Service Commission* v. *Southern Railway Company*, 341 U. S. 341, 348-349, 95 L. ed. 1002, 1008, to wit:

> "The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. Washington ex rel Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535 (1912). And, whatever an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. New York v. United States, 331 U. S. 284, 334-336, 91 L. ed. 1492, 1528-1530, 67 S. Ct. 1207 (1947); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U. S. 570, 576, 85 L. ed. 358, 362, 61 S. Ct. 343 (1941)."

[fol. 116] In attempted support of petitioner's contention for trial de novo, it has resorted to a rule heretofore announced in the Ben Avon Case, infra, that a utility is entitled to a judicial determination of both the law and the facts in a regulatory proceeding.

While not of controlling importance, as far as this proceeding is concerned, we wish to call this Court's attention to the fact that the Supreme Court has repudiated the rule which it announced in the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289, 64 L. ed. 908, 914, with Justices Brandeis, Holmes, and Clarke strongly dissenting. As lawyers are generally aware, that rule was of little practical value because courts were not inclined to try regulatory proceedings *de novo*. Particularly, this Court, under the limited statutory review existing, could

not retry a regulatory proceeding coming from the Commission because the statute requires the review to be determined solely upon the record of the Commission, the statute prohibiting this Court from taking additional evidence. Such a limited review by the Courts is constitutional. (*Alabama Public Service Commission v. Southern Ry. Co.* 341 U. S. 341, 348-349, 95 L. ed. 1002, 1008.) Obviously, the rule that a utility was entitled to the determination by a Court on both the law and the facts could have little utility where judicial review is limited to the record made before the regulatory body. The philosophy and attitude of this Court towards this subject has been clearly and elaborately stated in the case of *Southern California Edison Co. v. Railroad Commission*, 6 Cal. (2d) 737, at pages 746-749, and comment thereon would be superfluous. Over the years, the Ben Avon rule has been eroded and devitalized by the Courts themselves until the Supreme Court of the United States, in the cases of *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 581-582, 584, 84 L. ed. 1368, 1373, 1374; Id. 311 U. S. 570, 85 L. ed. 358; *New York* v. *U. S.*, 331 U. S. 284, 334-336, 91 L. ed. 1492, 1528-1530; *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341, 348, 349, 95 L. ed. 1002, [fol. 117] 1008, finally rejected that rule, although the Ben Avon decision was not expressly overruled. A reading of these cases clearly demonstrates the repudiation of the rule. Following is the language of the Supreme Court on the point in the *Alabama Public Service* Commission case, supra:

> "The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. Washington ex rel. *Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535 (1912). And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York* v. *United States*, 331 U. S. 284, 334-336, 91 L. ed. 1492, 1528-1530, 67 S. Ct. 1207 (1947); *Railroad Commission of Texas* v. *Rowan & Nichols*

Oil Co., 311 U. S. 570, 576, 85 L. ed. 358, 362, 61 S. Ct. 343 (1941)." (*Alabama Public Service Commission, et al. v. Southern Railway Company*, 341 U. S. 341, 348-349, 95 L. ed. 1002, 1008.)

In view of the fact that the Supreme Court of the United States—the Court that prescribed the Ben Avon rule—no longer follows said rule, surely there is no reason why this Court should follow it. The fact that the Public Utilities Act was amended in 1933 in formal compliance with the Ben Avon rule could not perpetuate the rule in California after the father of the rule has disowned it.

The Weight of Judicial Decision in the Great Majority of Cases Clearly Supports the Findings, Opinion and Order of Respondent, Public Utilities Commission.

In the absence of constitutional or valid statutory limitations, the State and its duly authorized political subdivisions have full power and authority, both at common law and under the federal constitution, to require separation of grades at crossings of public streets and highways by railroads and to require the railroads to pay as much as the entire cost thereof and to repair and maintain the separation structures after their construction. This is a proper exercise of police power by or on behalf of the sovereign.

In the case of *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254, U. S. 394, 65 L. ed. 322, an order had been made by the Board of Public Utility Com- [fol. 118] missioners of New Jersey requiring the Erie Railroad to install grade separations at fifteen street crossings in the city of Paterson. Fourteen of these crossings were required to be made by means of underpassed streets and the fifteenth by means of a viaduct carrying the street over the railroad. The order required the railroad company to pay the entire cost of all of these separations, with the exception that 10% of the cost was required to be borne by a streetcar company which occupied three of the crossings. Most of the streets involved were laid out later than the railroad tracks. The railroad company insisted that compliance with the order would result in its bankruptcy and attacked the order on the grounds that it was

unreasonable, arbitrary and a violation of the due process and interstate commerce clauses of the federal constitution. In affirming the order the Supreme Court of the United States, speaking through Mr. Justice Holmes (254 U. S. 412, 65 L. ed. 339), said:

"Streets ordinarily call for a necessary adjustment of two conflicting interests—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the state might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. (Citing cases.) To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the condi-

liens imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. (Citing cases.) If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. (Citing cases.) Intelligent self-interest should lead to a complete consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous."

In *Chicago, M. & St. P. R. Co. v. Minneapolis* (1916), 232 U. S. 430, 58 L. ed. 671, the city of Minneapolis had acquired certain property for park purposes which included two lakes in their entirety and a portion of the shores of a third lake, together with large tracts of land in the vicinity. It proceeded to construct two roads connecting the three lakes, together with walks on either side thereof. The railroad owned a right of way 300 feet wide which crossed the path of one of the proposed roads and the city sought to condemn an easement for this road and for bridges across this right of way. The railway tracks at the point in question were located on an artificial embankment 12 feet above the water level of the lakes. It was agreed that the city should take the land and construct the road and walks and that the railway company should build the bridges according to plans prepared by the city, but the railway company reserved the right to recover damages or compensation in the condemnation action and, likewise, in addition to the value of the land taken (which was paid), that it should be compensated for the extra cost of the necessary bridge across the canal and such further sum as would be sufficient to maintain the bridge. The judgment in the condemnation case awarded to the railroad only the value of the land taken together with the cost of certain features of the bridge which were purely ornamental. In affirming the judgment the Supreme Court of the United

Baxter, speaking through Mr. Justice Hughes, said (282 U. S. 537, 75 L. ed. 474):

[fol. 139] "The question thus presented is whether the railroad is under compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. . . . ."

Quoting from a Minnesota case the court proceeds:

" 'A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed.' . . . (Citing cases.)

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (citing cases); and we see no basis for a distinction in principle in the case of an intersecting public road opened

under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Missouri Pacific R. Co. v. Omaha* (1914), 235 U. S. 121, 59 L. ed. 157, the city of Omaha by ordinance required the railroad to construct a viaduct over its line at its intersection with Dodge Street, together with approaches thereto along the southerly line of Dodge Street, leaving the northerly side of the street open to public traffic. The ordinance required construction of the viaduct in accordance with plans and specifications prepared by the city [fol. 121] engineer. The railroad brought this action in the federal courts. The Circuit Court (which was then the federal court of original jurisdiction) dismissed the bill and this decree was affirmed both by the Circuit Court of Appeals and the Supreme Court of the United States. The latter court, speaking through Mr. Justice Day, said (235 U. S. 127, 59 L. ed. 160):

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court. (Citing cases.)

"This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. (Citing cases.)"

In *Lehigh Valley R. Co. v. Board of Public Utility Comrs.*, (1928), 278 U. S. 24, 73 L. ed. 161, the railroad sought to enjoin enforcement of an order made by the Board of Public Utility Commissioners of New Jersey requiring the railroad to eliminate two railroad grade crossings and to substitute in their place a single overhead crossing at the sole expense of the railway company in the amount of $324,000. In addition to raising the usual constitutional objections, the railroad claimed that an adequate crossing could be built for at least $100,000 less than the amount it was required to expend under the order and also claimed that the order unconstitutionally imposed a direct burden on interstate commerce and violated the interstate commerce law in that the required expenditures exceeded the legal duties of the railroad and the reasonable requirements of public safety and convenience. The case was instituted in the United States District Court and was heard by a three-judge court which dismissed the bill. On appeal [fol. 122] the Supreme Court affirmed the decree of dismissal and, speaking through Mr. Chief Justice Taft, said (278 U. S. 33, 73 L. ed. 166):

> "This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadway most desirable. The large expenditure to secure such advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.
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> "It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant.
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(278 U. S. 34, 73 L. ed. 167): "A railroad company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. (Citing cases.) This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.

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(278 U. S. 35, 73 L. ed. 167): "The care of grade crossings is peculiarly within the police power of the states (citing cases), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly [fol. 123] not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear."

So zealously have the courts guarded the police power of the states and their political subdivisions with respect to railway crossings of highways that they have held in numerous cases where municipalities have by contract

agreed with railway companies to pay the expense of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away." See for examples: *Chicago M. & St. P. R. Co.* v. *Minneapolis* (1914), 232 U. S. 430, 58 L. ed. 671, and *Northern Pacific R. Co.* v. *Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. ed. 630. In the latter case the court, speaking through Mr. Justice Day, said (208 U. S. 596, 52 L. ed. 636):

> "There can be question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. (Citing cases.) . . . We find no error in the judgment of the Supreme Court of Minnesota holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed."

In *State ex rel. Alton R. Co.* v. *Public Service Commission* (Mo. 1934), 70 S. W. 2d 57, 60, the Supreme Court of Missouri, in upholding an order of the Public Service Commission authorizing the widening of a concrete viaduct over a railroad, said:

> "The state has the right to build its other public highways, for travel by other means, over, across, or under the railroad. To accommodate such travel, it has the right to build new roads across railroads at new places and provide for the necessary kind of crossing, or to widen existing roads and alter such crossings already established, as the public interest may in either case reasonably require. *If it did not, it would no longer be the sovereign.* To exercise its police power for the preservation of the public safety, [fol. 124] this state has through the Legislature desig-

nated the Public Service Commission as the exclusive agency to determine and prescribe the manner and point of new crossings and to alter or abolish established crossings, apportion the expense, either of making new crossings or alterations of existing ones, and to provide for their maintenance.

"'*Salus populi suprema lex est*' is the fundamental principle of the police power of the state, as well as our state motto. Private corporations, accorded the privilege of operating railroads, declared to be public highways of the state, for the purpose of private profit, must pay a reasonable proportion of the cost of improvements, which the presence of their tracks make or contribute to make necessary, for the welfare and safety of the people of the state. We therefore hold that the Public Service Commission has the authority not only to provide for a separation of a grade between a public highway and a railroad, when conditions make that necessary and proper, but that it also has the power, whenever the manner of crossing formerly prescribed by it becomes inadequate in width, height, or strength, to reasonably provide for the safety and welfare of the traveling public thereon, to order it reconstructed to meet their reasonable needs." (Emphasis added.)

A review of the decisions of the respondent Public Utilities Commission and its predecessor Railroad Commission of California will show that throughout their history they have uniformly recognized the principle that this State has the right and the power to impose upon a railroad all or any part of the cost of grade separations including their alteration, relocation, or abolishment.

Petitioner has stated that the Commission has adopted the so-called benefit theory as a proper basis for the apportionment of costs but the decisions cited by it do not support such contention.

The *Goshen Junction* case, 38 C.R.C. 380 (1933) involved a state highway to be paid in part with Federal-aid funds for highway construction, in the course of which the Commission took cognizance of the then existing depression and expressly gave consideration to "the economic situa-

tion, particularly at this time when revenues from practically all sources are materially below what they have been in the immediate past." Said facts are borne out by the respondent Commission, Decision No. 25069 of August 15, 1932, reported in 37 C.R.C. 784, 786-787, as hereinbefore cited and in which it specifically repudiated the so-called "benefits theory" of apportioning grade separation improvement costs in these words:

> [fol. 125] "The matter of direct financial benefits is not the sole test of the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as the benefits derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease."

Other citations of the kind by petition appear so widely different, factually speaking, as not to require detailed analysis herein.

Decision Of The Public Utilities Commission Carries A Strong Presumption Of Validity.

In weighing contentions of petitioner's unconstitutionality, this Court must keep ever in mind that the decision assailed is supported by a strong presumption of validity. (*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53, 80 L. ed. 1033, 1042; *Market St. Ry. Co.* v. *Railroad Commission*, 24 Cal. (2d) 378, 399; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, 88 L. ed. 333, 345; *San Francisco* v. *Industrial Accident Commission*, 183 Cal. 273.)

Decision No. 47344 Of The Public Utilities Commission Has The Same Force And Effect As A Statute Enacted By The Legislature.

The Public Utilities Commission is a constitutional body to which has been delegated legislative authority, and its decisions in the execution of such legislative authority have the same force and effect as a statute enacted by the Legislature. All the presumptions of validity which surround a statute enacted by the Legislature based upon an exertion of the police power support the decision herein. The test of the constitutionality applicable to a statute applies equally to the constitutionality of the decision involved herein. (*Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 185-186, 80 L. ed. 138, 146; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69, 81 L. ed. [fol. 126] 510, 518; *Lewis* v. *Potomac Elec. Pr. Co.* (U. S. Ct. of Appeals, D. C.), 64 F (2d) 701, 702.)

The United States Supreme Court in the case of *Pacific States Box & Basket Co.* v. *White*, supra, 296 U. S. 176, 185-186, 80 L. ed. 138, 146, discussed the rule as follows:

> "* * * The order here in question deals with a subject clearly within the scope of the police power. See *Turner* v. *Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 S. Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, 79 L. ed. 281, 288, 55 S. Ct. 187.
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> "It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is

upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Ref. Co.* v. *Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241, and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174."

Decision Of The Commission Does Not Constitute An Unlawful Or Other Burden On Interstate Commerce.

Petitioner asserts that the decision of the Commission constitutes an unlawful burden upon interstate commerce. [fol. 127] The decision of the Commission shows and the fact is reflected by the petition for review that the instant intrastate improvement is not without substantial railroad benefits and considering the recorded financial status of petitioner, cannot remotely retard interstate commerce. Also, the petitioner concedes that its overall operations in California are profitable. It makes no contention that the decision herein will render confiscatory the return of petitioner on its California operations.

In such circumstances, the rule is elementary that a State may require the continuation of railroad service at a financial loss and that such requirement raises no issue under the Federal Constitution. (*Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341, 347, 352-353, 95 L. ed. 1002, 1007, 1010.) This rule has been consistently

followed by the Supreme Court of the United States and this Court's attention is called to the following decisions of that Court on the subject: *Missouri Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, 277-280, 54 L. ed. 472, 478-480; *Atlantic Coast Line R. Co.* v. *North Carolina*, 206 U. S. 1, 23-27, 51 L. ed. 933, 943-945; *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 308-309, 73 L. ed. 390, 396; and see the many cases cited by Mr. Justice Frankfurter in his concurring opinion in the *Alabama Public Service Commission* case, supra, at pp. 352-353 of the U. S. Report.

Petitioner does not categorically assert that a State has no authority to burden or regulate interstate commerce but it might be inferred that such contention is being made by petitioner from the propositions advanced by it. We desire to call to this Court's attention the rule laid down by the Supreme Court of the United States that a State may, lawfully, *burden* interstate commerce and regulate it so long as State authority does not discriminate against such commerce. (*South Carolina State H. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. ed. 993, 998; *Railway Express Agency* v. *New York*, 336 U. S. 106, 111, 93 L. ed. [fol. 128] 533, 539; *Kelly* v. *Washington*, 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13; *Cities Service Gas Co.* v. *Peerless O. & G. Co.*, 340 U. S. 179, 186, 95 L. ed. 190, 202.)

This Court May Not Substitute Its Judgment For That Of The Public Utilities Commission.

Petitioner has cited numerous decisions from other jurisdictions calculated to create the inference, at least, that Courts will substitute their judgment for the judgment of the regulatory body. Whether some States follow such a rule has no application here for the reason that the decisions of this Court and the plain provisions of Sections 1756-1760 of the Public Utilities Code compel the conclusion that this Court has no authority to substitute its judgment for the judgment of the Commission. (*Southern California Edison Co.* v. *Railroad Commission*, 6 Cal. (2d) 737, 746-749.)

Furthermore, the Supreme Court of the United States has held in an unbroken line of decisions that Courts must

not substitute their judgment for that of regulatory bodies. (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51, 80 L. ed. 1033, 1041; *Railroad Commission of Texas, et al. v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 581, 582, 584, 84 L. ed. 1368, 1372, 1374, pointing out that a Court must not substitute its judgment for that of the regulatory body *even though the evidence is convincing that the judgment of the Court is better than the result arrived at by the regulatory body*; *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 85 L. ed. 358; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596-597, 85 L. ed. 368, 377-378.)

This rule is not altered or varied, *even though the facts are not in dispute*. Such a state of the record makes no difference. (*Gray* v. *Powell*, 314 U. S. 402, 412, 86 L. ed. 301, 310.)

Mr. Justice Holmes, speaking for the Supreme Court of the United States, stated the rule very succinctly as follows:

> [fol. 129] "It is enough if we cannot say that it was *impossible* for a fair-minded board to come to the result which was reached." (Emphasis supplied.) (*San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 441-442, 47 L. ed. 892, 894.)

The Jurisdiction And The Authority Of The Public Utilities Commission.

By Article XII, Sections 17, 19, 20, 21, 22, 23, and 23a of the Constitution of the State of California, and the Public Utilities Act (Stats. 1915, Chap. 91), the Public Utilities Commission is given plenary and exclusive authority over public utilities in this State.

Section 22 of Article XII provides in part as follows:

> "No provision of this Constitution shall be so construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is ex-

pressly declared to be plenary and unlimited by any provision of this Constitution."

Section 23 of Article XII provides in part as follows:

"* * * The railroad commission (Note: Now Public Utilities Commission) shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

This equivalent provision is contained in Section 23a of said Article XII.

The Legislature may confer on the Commission any and all authority it possesses over public utilities and in addition it may confer powers upon the Commission that the Legislature itself could not exercise because of constitutional restriction imposed directly upon the Legislature. The only restraint imposed upon the Legislature in conferring powers upon the Commission pursuant to said Article XII is that afforded by the Federal Constitution.

The foregoing constitutional provisions and the Public [fol. 130] Utilities Act have received interpretation at the hands of this Court, and the plenary authority conferred thereby has been broadly upheld. *Pacific Tel. & Tel. Co.* v. *Eshleman*, 166 Cal. 640, 650, 689; *Clemmons* v. *Railroad Commission*, 173 Cal. 254, 258; *City of San Jose* v. *Railroad Commission*, 175 Cal. 284, 290; *Miller* v. *Railroad Commission*, 9 Cal. (2d) 190, 195, 198; *Sale* v. *Railroad Commission*, 15 Cal. (2d) 612, 617.

In *Sale* v. *Railroad Commission*, supra, this Court stated, at pages 617 and 618, as follows:

"* * * A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.

"The powers and functions of the Railroad Commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. (Cal. Const., art. XII, secs. 22, 23.) The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. (See Public Utilities Act, *supra passim*; 15 Cal. L. Rev. 445.) All hearings, investigations and proceedings are governed by the provisions of the act and by rules of practice and procedure adopted by the commission. 'No informality * * * shall invalidate any order, decision, rule or regulation made * * *' (Public Utilities Act, *supra* sec. 53.) *Hence, unless the act required the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order.*" (Emphasis added.)

The Constitutionality Of A Statute Will Only Be Passed Upon Where Absolutely Necessary.

It is a well-established general rule that the constitutionality of a statute will be passed on only if, and to the extent that, it is directly and necessarily involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned. Such determination must be ab- [fol. 131] solutely necessary in order to determine the merits of the case in which the constitutionality of the statute has been drawn into question. This is such a basic and well-established rule of this Court and of the United States Supreme Court that but a few of the leading decisions are cited herein: *State of Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 66 L. ed. 531; *Arkansas Fuel Oil Co.* v. *State of Louisiana*, 304 U. S. 197, 82 L. ed.

1287; *Franklin v. Peterson*, 87 C. A. (2d) 727, 730; *Great Western Power Co. v. City of Oakland*, 189 Cal. 689; *In re Herman*, 183 Cal. 152, 160 16 Corpus Juris Secundum 207, Sec. 94.

Petitioner, through its wholly owned subsidiary—Santa Fe Transportation Company—operates both as a "passenger stage corporation" and as an unrestricted certificated highway common carrier of general freight throughout the most populous and highly commercialized territories of California, including the metropolitan areas involved.

One of the complaints of petitioner, Santa Fe, to this Honorable Court is that the Public Utilities Commission in its Rehearing Order (Decision No. 47544, Appendix A, herein) authorizing and directing the enlarging of the existing inadequate and sub-standard underpass at Washington Boulevard, is playing into the hands of the commercial trucks thereby forcing Santa Fe to subsidize its competitors, (See Petition, pp. 9 and 10), owing to the admitted increased use of such improvements by the motor vehicle industry of California, and, as a justification for its unprecedented revolt against paying any part of the instant crossing improvements, we quote petitioner:

> "* * * The use of automobiles, buses, and trucks has increased tremendously, and highway carriers have taken over an increased proportion of all commercial transportation by use of larger, wider, higher, and faster automotive equipment and would reap the greatest benefit from the proposed construction. * * * That the factor of delay—particularly as to the commercial trucking industry—is the most important factor necessitating the proposed enlargement of the existing grade separations."

This is amazing and interesting, indeed, when consider-[fol. 132] ing the comparatively recent pleas and showings of petitioner's wholly owned subsidiary—Santa Fe Transportation Company, in P.U.C. certification Decisions Nos. 43006, 43365, and 43624, of June 14, October 4, and December 13, 1949, respectively (Reported in order named in 48 Cal. P.U.C. 712; 49 Cal. P.U.C. 98; and 49 Cal. P.U.C. 272.) for a highway common carrier certificate from respondent

—Public Utilities Commission of California—for commercial motor vehicle transportation of all general commodities between northern and southern California and intermediate points, embracing the very territory here involved.

The major point then and there stressed by petitioner in bolstering its claims of public convenience and necessity was its need for the said greater highway trucking speeds to offset railroad delays and, more especially, to match its commercial automotive trucking rivals—Pacific Motor Transport Company (wholly owned subsidiary of Southern Pacific Company) and others—throughout the highways of California, and, too, the proffered very highly standardized equipment at all times thus assured through the financial support guaranteed by parental backing—The Atchison, Topeka and Santa Fe Railway Company system.

It followed, how that record reflected the quaking of the smaller, less powerful, and less richly endowed highway carrier industry of the State at the inevitable impact of another such Goliath importing bigger, higher, wider, longer, faster and more powerful trucks backed by "bigger" money. Thus it is to inquire of petitioner just how said higher automotive speeds for its freight and passengers has promoted or can promote the public safety, be it underpass, overpass or at grade.

Furthermore, judicial notice undoubtedly will be taken of petitioner Santa Fe's twin operation, namely, its highway common carriage of passengers by motor buses (including high-powered articulated equipment) throughout the State by the same subsidiary, and in which passenger bus operations petitioner, Santa Fe railroad engages in [fol. 133] its own railway name as well. (6)

It ill behooves petitioner, therefore, to have spearhead

(6) For example, in addition to the above quoted recent cases, see P.U.C. Decisions Nos. 31028 of June 27, 1938; 27234 of July 20, 1934; 41414 of March 30, 1948; 30790 of April 18, 1938; and a long list of others enlarging and extending the petitioner's automotive freight and passenger service areas between Northern and Southern California and intermediate territories.

a drive for the overthrow of the regulatory statutes to which it has looked and continues to apply for both authorization and protection in its daily three-way performance of rail, truck, and bus operations as described, merely because of a fifty-fifty allocation of cost for this doubly needed widening of 20-foot roadways under its quadruple tracks so as to enable its own super trucks and buses to move safely join in this aforesaid automotive parade of the tax-paying public at large which, after all, supports the highways of California.

Surely, such a public utility may not avail itself of the benefits provided by law (Public Utilities Code of California, for example) and deny the burdens created by those same laws as a part of the contract of dedication to the public use. Quite obviously, the advocacy of petitioner's proposed "benefits" theory looks to the maximum advantages and other gains that may accrue from manifold operative rights about the State without the assumption of the attendant obligations—responsibilities and liabilities—imposed by the self same law. Strive as we may, we are at a loss to understand the "consistency" of this petitioner in its present attack on the instant decision. For petitioner seemingly forgets or has here ignored the fact that were it not for these ever increasing millions of motorists, truckers, passengers, and pedestrians (comprising the general shipping and traveling public) against which it here complains, it would have neither freight for its rail cars and trucks nor passengers for its coaches and buses [fol. 136] only official representative or prospective customer in California. And we sincerely trust that this Honorable Court will have no act as to refresh petitioner's memory that under provisions of the California Constitution and Section 67 of the Public Utilities Act (Now Public Utilities Code) there exist certain limitations against the sort of blanket review it here seeks; that the presumption of regularity is to be indulged with respect to Commission orders as here involved; that findings of fact by the Commission properly are to be accorded due weight in decision and order predicated thereon; and that if in the record thus builded by the Public Utilities Commission of Cali-

fornia there is to be found any substantial evidence to justify said Commission's decision its order will not be annulled and set aside.

Summary and Conclusion

In the instant situation, we respectfully urge that this Honorable Court is limited to a determination of whether the Commission has regularly pursued its authority including whether the order or decision in question violated any right of petitioner under the Constitution of the United States or of the State of California.

Summarized, the Court will appreciate the rather voluminous record in this matter, the copious pleadings, including opening, closing, and reply briefs, the extensive testimony and the numerous exhibits by the parties, and the fact that more than a full week of public hearings, including rehearing and oral argument before the Commission en banc, was accorded the parties herein before taking the matter under submission. And when it is considered that the carefully calculated costs themselves are not in controversy but only their apportionment as between opposing parties with their differing formulae, and that although the Commission did not adopt the method advocated by either petitioner Santa Fe or the City of Los Angeles, but basing its findings, opinions and order upon the entire record and in its discretion found for an even [fol. 136] division of the lesser of the two alternative construction plans, it must be clear that said order of the Commission was within its power and supported by the evidence and is reasonable and in conformity with the law. In so doing, it assuredly gave full and fair hearing to the parties, including petitioner, in the regular pursuit of its authority within the powers conferred by the statutes and the Constitution, hence its observance and the safeguarding of procedural due process.

Certainly, the Commission did not act hastily or arbitrarily, nor did it exceed its authority or abuse its discretion by ordering an equitable, just and reasonable allocation of the lesser of two alternative costs for the necessary improvement of Washington Boulevard crossing on behalf of the public interest involved. On the contrary, it is sub-

mitted that petitioner's claim to confiscation is wholly without merit and that it has not shown, in the slightest degree, that any of its statutory or constitutional rights have been violated.

For these and the additional reasons herein, coupled with the leading authorities therefor, as hereinbefore cited, it is contended that the Commission regularly pursued its authority and violated no right of petitioner and that the petition for a writ of review herein should be denied.

Respectfully submitted, /s/ Everett C. McKeage, Everett C. McKeage, /s/ Hal F. Wiggins, Hal F. Wiggins, /s/ Harold J. McCarthy, Harold J. McCarthy, Attorneys for Public Utilities Commission of the State of California.

Dated, San Francisco, California, September 12, 1952.

[fol. 136-138] Proof of Service

(omitted in printing)

[fol. 139] Appendix "A" to Answer

Decision No. 47344, Application No. 29396

(June 24, 1952)

Upon rehearing the City of Los Angeles authorized to widen, improve and increase the vertical clearance of the Washington Boulevard underpass under the main Harbor branch line tracks of the Atchison, Topeka and Santa Fe Railway Company, and the cost thereof apportioned.

(1a, 1b) Crossings—Grade Separations—Division of Costs. The law is well established that, under the exercise of the police power a state may require grade separation and also apportion the costs thereof. Section 1202 of the Public Utilities Code has vested such power in the Commission. The Commission is under no obligation to follow any particular theory, but must allocate costs fairly in the exercise of its sound discretion.

Roger Arnebergh, Assistant City Attorney for the City of Los Angeles, applicant. *Joseph H. Cummins*

and *Robert W. Walker*, for The Atchison, Topeka & Santa Fe Railway Company, protestant. *E. E. Bennett*, for Union Pacific Railroad Company, *Randolph Karr*, for Southern Pacific Company, *W. G. O'Barr*, for Los Angeles Chamber of Commerce, *Fred G. Seig*, for Order of Railway Conductors and *Robert C. Neill*, for California Fruit Growers Exchange, interested parties.

Opinion on Rehearing

By Decision No. 42374, dated October 4, 1949, on Application No. 29396, the City of Los Angeles was authorized to widen and increase the height of the existing under-[fol. 140] passes of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in the manner therein prescribed and subject to certain specified conditions. The decision further provided that the expense of constructing the undergrade crossings was to be borne by the City of Los Angeles with the exception of the sum of $95,160, which amount was to be borne by The Atchison, Topeka & Santa Fe Railway Company. Subsequently, the effective date of this order was extended sixty days.

Under date of November 22, 1949, the City of Los Angeles filed a petition for rehearing alleging that the decision was contrary to the law and the facts in that it assumed the City to be the principal beneficiary and disregarded the City's right to require the railroad to remove the tracks, that the proposed widening and increasing of the height of the underpasses are necessary in order to remove the railroad's interference with the City's easement for street purposes, which easement allegedly includes the "right to prevent any use of the ground beneath or the space above the easement in any manner which directly or indirectly interferes with the full utilization of such easement for street purposes," that the order of the Commission is in conflict with the Constitution of the State of California, Sections 6 and 8 of Article XI, in that the City "receives no legal benefit from the grade separation" since it allegedly has the right to "use its streets unimpeded and unhindered by the existence of the tracks," that the for-

mula adopted by the Commission to allocate costs is prejudicial to the City and has been improperly and incorrectly applied, and that the railroad should be required "to pay the full cost of the proposed improvement which is attributable to the presence of protestant's tracks."

Under date of December 2, 1949, The Atchison, Topeka & Santa Fe Railway Company likewise filed a petition for rehearing alleging that the Commission's conclusion is erroneous and contrary to law in assessing certain costs to the railroad since the City is the sole beneficiary of the proposed structure, that the proposed structure actually will be a detriment to the railroad, that the "benefit" theory should be followed in assessing costs, and that the assessing of costs to the railroad amounts to a taking of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 13 of the Constitution of the State of California.

The Commission's order granting a rehearing was issued March 28, 1950, and public hearings were held thereon before Commissioner Huls and Examiner Syphers on December 27 and 28, 1950, February 2 and 5 and March 19, 1951. On these dates evidence was adduced and on the last-named date the matter was submitted, with the parties being given the right to file briefs. The last of these briefs was filed June 29, 1951. At the request of the parties, the Commission en banc heard oral argument on this matter on November 28, 1951. It is now ready for decision.

[fol. 141] At the hearing all parties entered into a stipulation to the effect that all evidence in the prior hearings in this matter, leading to Decision No. 43374, supra, be incorporated in this record. This stipulation was accepted.

The crossings which it is proposed to widen and to increase in height are described as follows: Crossing No. 2H-0.1-B is the numerical designation of the crossing of Washington Boulevard and the Harbor Branch line. Its legal description is:

> That portion of the right of way, 66 feet wide, of The Atchison, Topeka & Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page

106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

Crossing No. 2-143.2-B is the numerical designation of the crossing of Washington Boulevard and the main line of applicant. Its legal description is:

That portion of the right of way, 100 feet wide, of The Atchison, Topeka & Santa Fe Railway Company (formerly of the California Central Railway Company), described in Deed recorded in Book 491, page 106, Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

The record discloses that Washington Boulevard is a public street extending from the westerly boundary of the City of Los Angeles at the Pacific Ocean in the Venice area, and easterly through the entire breadth of the City and then for a distance of several miles east of the easterly boundary of the City. The grade separations are in the City in an area which constitutes one of the principal industrial districts. Washington Boulevard throughout most of its length has a paved surface of at least 60 feet in width, with a few exceptions where the pavement width varies from 40 to 60 feet. At the site of the existing grade separations, here under consideration, the roadway narrows down to 20 feet in width, and the vertical clearance is between 13 feet and 14 feet. The City's easement at this point is 90 feet.

The evidence in this case discloses that the rail lines in the area of Washington Boulevard were first turned over to the railroad's operating department on September 23, 1887, for the harbor line, and November 24, 1888, for the main line (Exhibit No. 64 R.H.).

The present grade separations were constructed in 1914 in accordance with an agreement between the City of Los Angeles and The Atchison, Topeka & Santa Fe Railway

[fol. 142] Company. The costs of the structures were borne one-half by the City and one-half by the railway. In 1926 an additional superstructure for another track was installed, and the cost of this addition was paid for in its entirety by the railway.

The applicant City of Los Angeles, during the course of the original hearings, presented three proposals: (1) to fill in the present separation and have the crossings at grade (2) to use the present grade separations for eastbound traffic and to build a new westbound roadway at grade and (3) to widen and increase the height of the existing underpasses. This third proposal is the one which is preferred by applicant. At the second hearing an engineer for the Bridge Division of the City of Los Angeles testified that this proposal, as shown on Exhibit No. 13 of the original hearing (1), is still included in the City's plans.

The original estimated cost of this proposal was as follows:

Two span-deck girder railway bridges,		
One west of Harriett Street	$192,000	
One east of Harriett Street	204,000	$396,000
Structure wing walls and walls between structures		79,800
Storm drain, sewer		240,550
Slope rights		5,750
Total		$722,100

However, at the rehearing, the prior estimates of cost (Exhibits No. 14 and No. 15) were revised upwards as set out in Exhibits No. 21 R.H. and No. 22 R.H. The preferred proposal contemplates two bridges with deck girders of rolled, wide flange beam construction on two spans, providing two 43.5-foot openings with a median pier. Each

(1) The exhibits introduced at the original hearing were numbered from 1 to 20, inclusive, those at the rehearing from 21 R.H. to 63 R.H.

opening would have a 33-foot roadway for three lanes of traffic and a 7-foot pedestrian walk (2).

There was also advanced another proposal to have two 70-foot clear span, through-girder type of bridges, having a single roadway of 56 feet between curbs and two 7-foot walks for pedestrians.

The revised estimates of costs of these proposed structures follows:

Two clear span bridges:		
Bridge aA-1	$252,700	
Bridge aA-144	258,600	$511,300
Retaining and wing walls		57,845
		$569,145
Two divided span bridges:		
Bridge aA-1	$234,000	
Bridge aA-144	246,200	$480,200
Retaining and wing walls		89,155
		$569,355

[fol. 143] In addition to the foregoing costs, there will be additional costs for a storm drain sewer and also for slope rights.

In Decision No. 43374 we pointed out that the roadway on the Washington Boulevard bridge crossing the Los Angeles River is only 56 feet in width. Because there are no intervening streets between this bridge and the underpasses here in question and because of the short distance between the underpasses and the bridge, the width of the bridge roadway was held to be a limitation to the carrying capacity of the street.

The engineer for the Bridge Division of the City of Los Angeles presented testimony to the effect that it is entirely practical to widen this bridge. Exhibit No. 23 R.H. shows

(2) The details of this proposal are set out in Exhibits 9, 10, 11 and 13.

three possible ways of doing this and Exhibit No. 24 R.H. shows the estimates as to costs thereof. The plan preferred by the witness would provide a 66-foot roadway with two 5-foot 10-inch sidewalks and would cost $122,081. One of the other plans would provide a 60-foot roadway and two 5-foot 10-inch sidewalks at a cost of $100,959, while the remaining plan would provide a 60-foot roadway and one 5-foot 10-inch sidewalk at a cost of $17,580.

While the City or Los Angeles has no immediate plans for widening this bridge, it was the opinion of the witness that this should be done if the underpasses are widened as proposed.

The engineer of Street and Parkway Design for the City of Los Angeles testified that, in his opinion, the proposed underpass should make full use of the present 90-foot right of way and that to construct an underpass of 56 feet now would not be wise since it would be too difficult to widen in the future. Also, it was pointed out that the advisable procedure would be to widen the underpass first and then widen the Los Angeles River bridge, the contention being made that the traffic needs justify such construction.

If the two divided span bridges are constructed, as recommended by the City, there would be two 33-foot roadways, permitting three 11-foot lanes in each direction. In addition, sidewalk facilities should be provided and the recommendation was that they be seven feet wide, one for each roadway.

Exhibit No. 25 shows the estimated total cost of this construction to be as follows:

Bridges	$480,200	
Walls	89,155	
Slopes	5,750	$575,105
Storm drain	——	152,660
Street work	——	72,810
Sewer	10,350	——
Traffic safety devices	1,840	12,190
		$812,765

Of the above amounts it was estimated that all of the cost of the bridges, walls and slopes, amounting to $575,105, [fol. 144] and slightly more than one-third of the cost of the storm drain and street work, amounting to $125,910, or a total of $701,015, were costs necessitated by the presence of the railway. In other words, the cost to the City, if the railroad were not present, would be as follows:

Storm drain	$50,900
Street work	48,660
Sewer	10,350
Traffic safety devices	1,840
	$111,750

If this construction is carried out, the costs will have to be met without any help from state funds, according to this record.

Further testimony indicated that the bridge over the Los Angeles River was built in 1931 and it was then that Washington Boulevard became a through street. Prior to that time the existing underpasses were adequate, since they were used only by garbage trucks.

The principal traffic engineer of the City of Los Angeles referred to the prior record, Decision No. 43374, supra, and indicated that the present volume of traffic in the vicinity of the underpass exceeds by five per cent the volume as shown by said prior record. Likewise he reiterated that traffic which normally would use Washington Boulevard is now being diverted to other streets. Exhibit No. 26 R.H. shows the traffic volume in the area, as of Wednesday, December 1, 1948, and also as of Wednesday, December 13, 1950. This exhibit corroborates the above testimony. Exhibit No. 27 R.H., a speed and delay study of this area, also indicates the present underpass to be a bottleneck to traffic.

Exhibit No. 28 R.H. is a record of the accidents which occurred in the area and were reported to the Police Department during the period from February 2, 1948 to February 2, 1951. In this connection the general claim agent for Santa Fe presented testimony that the railroad has had no costs for property damage or personal injury

claims at this underpass. There has been but one claim, wherein an automobile hit the bridge but there was no liability on the part of the railroad.

A consulting engineer, testifying on behalf of the railroad, presented testimony and exhibits in relation to the problem. It was his opinion that widening the underpasses would increase the railroad's costs but would not increase its business. Further, any need for widening or increasing the height of the underpasses is occasioned by highway traffic and not by railroad operations. In the opinion of this witness, the financial soundness of a railroad could be undermined by placing on it too great a share of the cost of grade separations. In this instance, he pointed out, the widening of the underpasses would provide no benefit to the railroad, but actually would be a detriment because of the added expense to the railroad of maintaining a larger structure.

[fol. 146] Exhibit No. 29 R.H. is a study compiled by this witness in support of the opinions hereinabove indicated, containing a rather detailed study of the relationship of highways to railroads and the resultant problems of their crossings both at separations and at grade. Among other items, this exhibit contains data showing the grade separations constructed in California during 1948 and 1949, the cost, and the railroads' contributions, if any. Out of the thirty cases listed, five were financed under the Federal Aid Secondary Program and twenty-five were financed out of State funds. Twenty-seven were cases in which the railroad made no contribution, while in the remaining three, one Federal Aid and two State fund projects, the railroads' contribution ranged from 0.5 per cent to 15.4 percent. All of these thirty constructions were new grade separations and not, as herein proposed, widening of existing overpasses. It was the opinion of this witness that a railroad derived more benefit from a new separation, where the disadvantages of a grade crossing are removed, than from the enlarging of existing structures where the railroad already has the advantage of an existing separation.

In Exhibit No. 31 R.H., this witness amplified this testimony by listing all of the grade separations constructed in California since 1920, showing the percentage of cost

allocated to the railroad in each instance, and in Exhibit No. 30 R.H. he set out the total revenues of the various types of carriers in California. The revenues of highway carriers varied from 63.9 per cent of the total for all carriers in 1938, to 73.7 per cent in 1949, the low during this period occurring in 1940 at 65.3 per cent and the high in 1946 at 74.1 per cent.

This witness likewise presented a suggested plan for allocating costs of construction at grade crossings, which plan is set out in Exhibit No. 32 R.H. Further testimony of this witness related to population and motor vehicle registrations (Exhibit No. 33 R.H.), the highways in the area (Exhibit No. 34 R.H.), the general background of rail and highway development, and also some material on the present needs of the highway traffic in the area concerned.

Other witnesses for the railroad reiterated the contention that the widening of these underpasses would provide no benefit to the railroad. The annual reports of the Santa Fe to this Commission were placed in this record by stipulation. While they indicate the railroad to be receiving a rate of return of five per cent net in 1949, yet the witnesses strongly contended that to assess any part of the cost of this grade separation to the railroad would place a financial burden on it without any benefit to the railroad being derived therefrom.

A representative of the Order of Railway Conductors testified that in the opinion of the group he represented the cost to the railroad should be limited to ten per cent.

[fol. 146] The executive director of the League of California Cities filed a resolution, Exhibit No. 53 R.H., which resolution approved a formula of allocating costs, whereby the municipality would stand that portion of the total costs of building the improvements if there were no railroad tracks involved and that the railroad would bear that portion of the cost occasioned by the presence of the railroad tracks. Additional testimony produced by the railroad related to the average annual rate of return from 1930 to 1949 for all class one railroads in the United States and, individually, for The Atchison, Topeka & Santa Fe, Southern Pacific and Union Pacific railroads (Exhibit No. 35 R.H.). The same witness also testified, upon cross-exami-

nation, that the Santa Fe stock now sells for about $160 whereas ten years ago it was below $100.

The income of the railroad, as shown by its Federal income tax returns for the years 1930 to 1949, was received in evidence as Exhibit No. 63 R.H.

It was also pointed out that recently this company has started a motor carrier operation in California known as the Santa Fe Transportation Company.

Exhibits 37 and 38 R.H. show the accident record and claim costs for a five-year period at certain crossings of the Santa Fe Railroad with various highways. The railroad contended that the most hazardous crossings are in rural areas where there is high-speed auto travel and also high-speed train travel and that there are less accidents at city crossings.

A three-day traffic count of motor vehicles using Washington Boulevard was made in the vicinity of the underpasses here concerned during the days of November 27 and 29 and December 1, 1950 (Exhibits Nos. 39, 40 and 41 R.H.). It was stated by the railroad witness that the only congestion during this traffic count was an eastbound traffic which was blocked at Soto Street.

The bridge engineer for the railroad presented estimates as to the costs of various types of bridges which could be constructed to replace the existing structures (Exhibit No. 42 R.H.). He also called attention to the fact that the Union Pacific Railroad has a bridge across Washington Street east of Soto Street. This bridge provides for four lanes of traffic and could not be widened without great expense. Photographs of this bridge were presented as Exhibits Nos. 43 to 46 R.H. and an elevation drawing of this bridge was submitted as Exhibit No. 47 R.H. This same witness likewise presented the "as built" plans for the existing underpasses here in question, Exhibits 48 and 49 R.H. Other railroad witnesses testified that a four-lane bridge at the existing underpasses might sufficiently meet the needs of traffic.

The manager of the Metropolitan Traffic and Transit Department of the Los Angeles Chamber of Commerce stated he believed the traffic in the area to be sufficient to justify construction of a six-lane underpass.

[fol. 187] Various documents of title were introduced into the record both by the Santa Fe and the City of Los Angeles. Exhibits Nos. 50 to 52 R.H. show the Santa Fe's deeds relating to the right of way for its rail tracks in the area, and Exhibits Nos. 54 to 58 R.H. are additional documents introduced by the City relative to the right of way.

Exhibit No. 59 R.H. is composed of copies of franchises from the City of Los Angeles issued to the Santa Fe Railroad covering various crossings and, in particular, one of the underpasses here under consideration.

An engineer of the City of Los Angeles presented testimony pertaining to several grade separations which have been built in recent years in the Los Angeles area. Exhibit No. 60 R.H. shows details of some of these underpasses. Exhibit No. 61 R.H. shows the "live loading" standards of railroad bridges as set out under the specifications of the American Railway Engineers' Association, as well as the recommendations made by that body. According to the witness, the present structures here under consideration were not in accordance with the recommended standards.

The City of Los Angeles further presented a land use map of Washington Boulevard between Alameda Street and Soto Street (Exhibit No. 62 R.H.) tending to show that Washington Boulevard in the vicinity of the underpasses here in question is not a freeway but is used as an access street to the adjacent properties.

After a careful consideration of all of the evidence adduced herein, and in the light of the evidence adduced in the original hearings, having the benefit of the briefs and oral arguments which have been presented, we conclude to affirm our prior findings to the effect that there is a need for widening and increasing the height of the existing underpasses.

We also find that the preferred plan of the City of Los Angeles, as set out in Exhibit No. 13, heretofore described, sets out the construction which would be most practicable and best meet the public safety, convenience and necessity in this matter.

Our question herein, therefore, is primarily one of cost. If the proposed underpasses are constructed, who shall bear the expense? The positions of the parties have not

changed since the prior hearings. Throughout these proceedings the City of Los Angeles has contended that the railroad should pay that portion of the total cost which is attributable to the presence of the railroad tracks. Under this contention it is the City's position that it should pay only that cost of widening the street which it would pay if there were no railroad crossing, and all other costs, including the cost of the bridge and its supports, should be borne by the railroad.

[fol. 148] It has been the position of the railroad throughout these proceedings that the costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed structures since it now is operating in a satisfactory manner over the present structures, and the widening of the street will in no way change these operations. As a matter of fact, it is the railroad's position that the construction of new structures will actually be a detriment, since there will be increased costs in their maintenance. The railroad further contends that the need for new structures has not arisen because of any railroad operations, but rather because of the increased motor vehicle and pedestrian traffic in the vicinity.

In the light of the particular facts in this record, we do not subscribe to either contention. Previously, in Decision No. 43374, we held that, due to the width of the existing bridge over the Los Angeles River, and giving consideration to the length of the proposed structure, as well as to the length of the existing structure, 40 per cent of the cost attributable to the presence of the railroad tracks should be allocated one-half to the railroad and one-half to the City.

In the light of the facts presented at the rehearing, particularly with reference to the possibilities of widening the existing bridge over the Los Angeles River, and also with reference to the costs of the various structures proposed, as hereinbefore set out, we find that the method of allocating costs, as set out in Decision No. 43374, should be discarded.

(1b) The authority of this Commission to allocate costs

in this matter stems primarily from Section 1202 of the Public Utilities Code, from which we quote in part:

> "The commission has the exclusive power:
>
> "(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.
>
> "(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 96 per cent of the [fol. 149] total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. (1a) We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671;

Missouri Pacific Railway Company v. Omaha, 1918, [illegible] U. S. 126; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161).

The railroad here contends that the modern development of the law in regard to apportionment of costs in grade separation cases has been toward the allocating of such costs according to the benefits received by the parties involved. In 1932, we are reminded, these same parties were before this Commission in a similar proceeding involving a proposed widening of the same two crossings. (Decision No. 25009, dated August 16, 1932, in Application No. 18063, 27 C.R.C. 784). The Commission's order authorized the widening, and held that the costs should be borne "25 per cent by The Atchison, Topeka & Santa Fe Railway Company and 75 per cent by applicant." The Commission then said, "In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived." However, this record discloses that material changes have taken place in conditions at the present time as compared to those in 1932. As we said in Decision 43374, *supra*, "The great increase in population and the tremendous increase in motor vehicle traffic present a new problem."

Likewise, the railroad relies rather strongly on the decision of the United States Supreme Court in *Nashville, Chattanooga and St. Louis Railway v. Walters*, 1934, 294 U. S. 405; 79 L. ed. 949. There an order of the State Commissioner of Highways requiring the railroad to construct and pay one-half the cost of an underpass at the intersection of the tracks and a proposed state highway was held to be arbitrary and unreasonable since the railroad received no benefits from the proposed construction. In that case the highway involved was not designed to meet local transportation needs, but was a state highway intended to [fol. 130] be a link in the national transportation system, and the financing thereof was to come largely through Federal aid.

In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and

the City's contribution thereto must come entirely from local funds.

In Decision No. 43374, *supra*, we said "the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated." While we hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad. Because of the grade separation it can operate longer trains without experiencing delays at this location and without the hazard of grade crossing accidents. The proposed structure would result in a new bridge to replace one that is 75 per cent depreciated, and the new bridge would conform to the recommend "live loading" standards or *Cooper* ratings whereas the present structures do not.

As previously pointed out herein, the estimated costs of the proposed structures which may be said to be attributable to the presence of the railroad tracks for two divided span bridges is $569,355. The remaining costs are clearly attributable to the paving and widening of the street. We find that this amount of $569,355 is the amount of costs which should be allocated in this proceeding.

After a full consideration of all of the evidence, briefs and oral argument presented in this matter, we hereby find it to be in the public interest to authorize the widening and increasing of the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company, in accordance with the preferred plan of the City of Los Angeles as previously described herein. We further find that The Atchison, Topeka & Santa Fe Railway Company shall bear fifty per cent (50%) of the said amount of $569,355, the costs to be allocated, hereinabove indicated, and the City of Los Angeles the remainder.

Order on Rehearing

Application as above entitled having been filed, a hearing and rehearing having been held thereon, and the Commission being fully advised in the premises,

It is ordered that the City of Los Angeles be, and it

hereby is, authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of The Atchison, Topeka & Santa Fe Railway Company in the manner and at the locations more particularly described [fol. 151-152] in the foregoing opinion, and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. Fifty per cent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the costs shall be borne by the City of Los Angeles.

2. In the event applicant elects to construct said undergrade crossings, the cost of maintaining those portions of the separations which, for the purpose of this decision, shall be referred to as the superstructures, which shall be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka & Santa Fe Railway Company. The remainder of the maintenance of said structures shall be borne by applicant.

3. Prior to the commencement of construction, applicant shall file with this Commission for approval a set of plans for the proposed alterations of the grade separation crossings, which plans shall have been approved by The Atchison, Topeka & Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve such plans. In the event the said railway company refuses to approve such plans, this Commission may issue supplementary orders in this matter.

4. The crossing shall be constructed with clearances conforming to the provisions of General Order 26D of this Commission.

5. Within thirty (30) days thereafter, applicant shall notify this Commission, in writing, of the completion of the installation of said crossings and of its compliance with the conditions hereof.

6. The authorization herein granted shall lapse if

not exercised within one (1) year after the date hereof unless further time is granted by subsequent order.

The effective date of this order shall be sixty (60) days after the date hereof.

Dated at San Francisco, California, this 24th day of June, 1952.

Mittelstaedt, Creamer, Huls, Potter, Mitchell, Commissioners.

[fol. 153-154] APPENDIX "B" TO ANSWER.

Decision No. 47622

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation, for an order or orders authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of The Atchison, Topeka & Santa Fe Railway Company, designating the portions of the work to be done respectively by said city and by said railroad corporation and allocating the cost thereof between said city and said railroad corporation.	Application No. 29396

ORDER DENYING REHEARING

The Atchison, Topeka and Santa Fe Railway Company having filed its petition for rehearing respecting Decision No. 47344, rendered by the Commission herein on June 24, 1952, the Commission having considered said petition for rehearing and being of the opinion that no cause has been shown for the granting of the same,

It is ordered that said petition for rehearing be and the the same is hereby denied.

Dated, San Francisco, California, this 26th day of August, 1952.

Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell Commissioners.

Certified as a True Copy, Noel Coleman, Asst. Secretary, Public Utilities Commission, State of California.

[fol. 155-156] APPENDIX "C" TO ANSWER.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation, for an order or orders authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of The Atchison, Topeka & Santa Fe Railway Company, designating the portions of the work to be done respectively by said city and by said railroad corporation and allocating the cost thereof between said city and said railroad corporation.	Application No. 29396

ORDER STAYING THE OPERATIVE EFFECT AND EFFECTIVE DATE OF DECISION

The Atchison, Topeka and Santa Fe Railway Company having filed its petition for review with the Supreme Court of the State of California respecting Decision No. 47344, rendered by the Commission herein on June 24, 1952, and good cause appearing therefor,

It is ordered that the operative effect of said Decision No. 47344 and the effective date thereof are hereby stayed pending the determination of said review proceeding and until the further order of the Commission.

Dated, San Francisco, California, this 26th day of August, 1952.

Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell, Commissioners.

Certified as a True Copy, Secretary, Public Utilities Commission of the State of California.

[fol. 157-158] APPENDIX "D" TO ANSWER.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation, for an order or orders authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, designating the portions of the work to be done respectively by said City and by said railroad corporation and allocating the cost thereof between said city and said railroad corporation.	Application No. 29396

ORDER GRANTING REHEARING

The City of Los Angeles and The Atchison, Topeka and Santa Fe Railway Company having petitioned for rehearing in respect to Decision No. 43374 in the above proceeding, the Commission having considered each of the allegations therein, it appearing to the satisfaction of the Commission that said petitions should be granted for the purpose of reconsidering the apportionment of costs between said petitioners of the proposed grade separations, and good cause appearing,

It is hereby ordered that rehearing is hereby granted.

Said rehearing is set before Commissioner Huls, or such Examiner as may hereafter be designated to take

evidence in his behalf, at 10:00 o'clock a.m., on Thursday, the 7th day of December, 1950, in the Courtroom, Mirror Building, 145 So. Spring Street, Los Angeles, Calif.

The Secretary is directed to cause copies of this order to be served upon all appearances at least ten (10) days prior to the date set for said rehearing.

Dated, San Francisco, California, this 28th day of March, 1950.

R. E. Mittelstaedt, Justus F. Craemer, Ira H. Rowell, Harold P. Huls, Commissioners.

Commissioner Kenneth Potter, being necessarily absent, did not participate in the disposition of this proceeding.

[fol. 159-160] APPENDIX "E" TO ANSWER.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of THE CITY OF LOS ANGELES, a municipal corporation, for an order or orders authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of The Atchison, Topeka and Santa Fe Railway Company, designating the portions of the work to be done respectively by said city and by said railroad corporation and allocating the cost thereof between said city and said railroad corporation.	Application No. 29396

ORDER EXTENDING TIME

A written request having been filed by the City of Los Angeles, and concurred in by The Atchison, Topeka and Santa Fe Railway Company, and good cause appearing,

It is hereby ordered that the effective date of the Order

in Decision No. 43374, dated October 4, 1949, shall be extended to sixty (60) days after the date thereof.

Dated at Los Angeles, California, this 11th day of October, 1949.

R. E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, Commissioners.

Certified as a true Copy, Asst. Secretary, Public Utilities Commission, State of California.

[fol. 161] APPENDIX "F" TO ANSWER.

DECISION No. 43374, APPLICATION No. 29396

(October 4, 1949)

City of Los Angeles authorized to widen and increase the height of the existing underpass of Washington Boulevard and the Harbor Branch and main lines of The Atchison, Topeka and Santa Fe Railway Company, with the latter contributing $95,160 to the cost of said project.

Crossings—Division of Costs. The matter of direct financial benefits is not the sole test in apportioning costs between a railroad and the public. Also must be considered the continuing obligation of a railroad to participate in the constructing, maintaining and improvement of crossings over its tracks, both at grade and at separated grades.

Roger Arnebergh, Assistant City Attorney, for City of Los Angeles; *R. W. Walker* and *Wm. F. Brooks*, for The Atchison, Topeka and Santa Fe Railway Company, protestant.

OPINION

The petition of the City of Los Angeles, applicant herein, concerns the proposed widening and increasing of the vertical clearance of two grade separation crossings of Washington Boulevard and the Harbor Branch line (1) and the

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(1) This crossing is designated as Crossing No. 2H-O.1-B, and the legal description is as follows:

That portion of the right of way, 66 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), de-

main line (2) railroads of The Atchison, Topeka and Santa Fe Railway Company. The petition alleges that the present grade separations are inadequate to meet the present demands of vehicular traffic in that they are too narrow and the vertical clearances are too low. Applicant requests that this Commission issue its order authorizing and requiring the proposed improvements, and also designating the work to be done and the costs to be apportioned to each of the parties hereto.

Protestant, The Atchison, Topeka and Santa Fe Railway Company, in its answer to the above-mentioned petition, denies, upon information and belief, any need for changing the existing grade separation crossings, and further alleges that the present crossings are wholly sufficient for the needs of the railroad and the convenience and necessity of the public using the railroad facilities. Respondent contends that, since it will receive no benefit from the proposed changes, and since any alleged need for these changes has been occasioned, not by the railroad activities, but by automotive traffic using the highway, it should not be required to bear any of the costs of changes that might be made.

Public hearing was held in Los Angeles, California, on December 6, 1948, before Examiner Syphers, at which time evidence was adduced and the matter submitted, the parties being granted permission to file written briefs. Applicant has filed opening and closing briefs, and protestant has filed a reply brief. The matter is now ready for decision.

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scribed in Deed recorded in Book 491, page 106, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

(2) This crossing is designated as Crossing No. 2-143.2-B, and the legal description is as follows:

That portion of the right of way, 100 feet wide, of The Atchison, Topeka and Santa Fe Railway Company (formerly of the California Central Railway Company), described in Judgment of Condemnation had in Case No. 6855 of the Superior Court of the State of California in and for the County of Los Angeles, a copy of which judgment is recorded in Book 361, page 77, of Deeds, Records of said County, included within the lines of Washington Boulevard, 90 feet wide, at Harriett Street.

[fol. 162] Washington Boulevard is a public street extending from the westerly boundary of the city at the Pacific Ocean, in the Venice area, easterly through the entire breadth of the city and for a distance of several miles east of the easterly boundary of the city (3). In the vicinity of the grade separation crossings here under consideration, Washington Boulevard traverses one of the principal industrial districts of the Los Angeles area. Throughout most of its length, Washington Boulevard has a paved surface at least 60 feet in width, with some exceptions where the pavement width varies from 40 to 60 feet. However, at the site of the two crossings here under consideration, the pavement narrows down to 20 feet in width while the street easement at these points is 90 feet. The vertical clearance of these grade separations is between 13 and 14 feet.

Witnesses for applicant testified as to the need for enlarging these two grade separation crossings. Due to the rapid increase in population in Los Angeles City and also in the county, the automobile traffic has greatly increased. This has caused a congested condition at the site of the two crossings in question inasmuch as the underpasses are too narrow and too low to permit a free flow of traffic. It is very difficult for trucks to pass each other in the underpasses, and some of the larger vehicles cannot safely go under the underpasses because of their height. All of these factors, in addition to causing congestion at the site of the underpasses, also cause a diversion of traffic. Vehicles turn to other streets, and studies (4) made by the principal traffic engineer of the City of Los Angeles show heavy turning movements at intersections in the vicinity of the underpasses. These heavy turning movements create safety hazards at the intersections where they are made.

Exhibits 3 to 7 inclusive are photographs of the two underpasses and corroborate the description of the conditions there existing as given by various witnesses.

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(3) Exhibit 8 is a map of Washington Boulevard.

(4) Exhibit 2 shows the results of a traffic check made by the City of Los Angeles as to the hourly volume of vehicles and the right and left turns at intersections in the vicinity of the two underpasses.

Some of applicant's witnesses testified that there was a need for public bus transportation along Washington Boulevard in the vicinity of the underpasses but that the inadequacy of these underpasses has deterred the institution of such bus service. Other testimony was to the effect that it is becoming increasingly important to have through highways in Los Angeles. Washington Boulevard, for the greater part of its length, is a through highway and the widening of the underpasses in question would make it a through highway for its entire length. Furthermore, Washington Boulevard is one of the streets which has a bridge crossing the Los Angeles River.

[fol. 183] The two grade separation crossings here under consideration were constructed in 1914 pursuant to an agreement between the City of Los Angeles and The Atchison, Topeka and Santa Fe Railway Company. The costs were borne one-half by the city and one-half by the railroad. In 1926 an additional superstructure for another track was installed and the entire cost of this was paid for by the railroad.

Three proposals are advanced by the applicant. One is to fill in the present separation and have the crossings at grade. The second is to use the present grade separations for east-bound traffic and build a new west-bound roadway at grade. The third is to widen and increase the height of the existing underpasses and maintain the grade separation. The last of these proposals is the one most strongly advocated. Also, the testimony shows that a grade separation is the most desirable type of crossing for this situation, in that the volume of traffic is too heavy to satisfactorily and safely be handled over a grade crossing.

The total cost of widening the present underpasses and constructing new bridges is estimated to be $722,100, (5) and exhibits were introduced at the hearing showing the details of this contemplated improvement. (6) A break-

(5) Exhibit 12.

(6) Exhibits 9, 10, 11, and 13.

down of the estimated costs was given by an engineer who testified for applicant, as follows:

Two span-deck girder railway bridges,		
One west of Harriet Street	$192,000	
One east of Harriet Street	204,000	$396,000
Structure wing walls, and walls between structures		79,800
Storm drain, sewer		240,550
Slope rights		5,750
Total		$722,100

An analysis of all of the evidence presented herein shows that there is practically no dispute as to the factual situation. The testimony and exhibits showing the desirability and need of widening the existing underpasses and providing more vertical clearance were not seriously challenged nor controverted. Likewise, the estimated cost of the proposed improvements was not challenged. The issue in the matter, therefore, resolves itself into a legal inquiry. What portion of the costs, if any, shall be borne by the railroad? In considering this question we have had the benefit of applicant's opening and closing briefs and protestant's reply brief.

The City of Los Angeles contends that the railroad should bear that portion of the costs which the existence of the railroad tracks adds to the cost of the proposed improvement. Under this contention it is argued that the City of Los Angeles should pay only that cost of widening the street which it would pay if there were no railroad crossing; [fol. 164] all other costs, such as the cost of the bridge and its supports, should be borne by the railroad. The public, it is contended, should not be required to pay additional costs for street improvements when these additional costs are occasioned by the presence of the railroad.

The protestant railroad takes the position that costs should be allocated according to benefits received. It contends that the railroad will receive no benefits from the proposed widening since it is now operating satisfactorily and the widening of the street will in no way change these

operations. As a matter of fact, the railroad contends the proposed improvements will actually be a detriment since there will be increased costs involved in maintaining the longer bridge. It contends that the need for widening the underpasses has arisen, not because of any activity of the railroad, but because of the increase in motor vehicle and pedestrian traffic.

In 1932 these same parties were before this Commission in a similar proceeding involving the same two crossings. (7) At that time the proposal of the City of Los Angeles was to widen the two grade separations so that the roadway under them would have a width of 56 feet. This Commission issued its order authorizing widening of the grade separations and holding that the costs should be borne "25 per cent by The Atchison, Topeka and Santa Fe Railway Company and 75 per cent by applicant." The order further provided that the authorization therein granted should lapse and become void if not exercised within one year from the date thereof. The authorization was not exercised and, therefore, lapsed according to its terms.

As pointed out by applicant in its closing brief, we cannot now fail to take note of the material change in conditions at the present time as compared to those in 1932, at the time of Decision No. 25069, supra. The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.

According to the evidence presented, the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic. The area in the vicinity of the two underpasses here under consideration has become one of the leading industrial areas of Los Angeles and its environs. As a result, there is a large amount of motor truck traffic hauling to and from these areas. The reasons advanced by applicant for widening the underpasses, which reasons were not disputed by protestant, were the increase in motor vehicle traffic, both passenger and commercial, the need to make Washington Boulevard a through street for its entire length, the need for a bus line to transport passengers

(7) Decision No. 25069, dated 8/15/32, in Application No. 18063, 37 CRC 784.

through that area, and the inadequate height of the present underpass. It was pointed out that the height of the underpass should be increased so as to provide adequate clear-
[fol. 165] ance for commercial vehicles. All of these factors have resulted in a congestion of traffic in the area of the underpasses, and the diversion of traffic to other streets, which diversion is felt even in the central business district of Los Angeles.

The protestant railway company contends that none of these factors are due to the operation of the railroad; that the railway operations are being conducted satisfactorily over the present underpasses. A fair view of all of the evidence presented in this matter supports this contention. Thus we are specifically faced with the problem of who shall pay the cost of widening of the underpass where the necessity for such widening is not due to the activities of the railroad but rather to the needs of the automotive and pedestrian traffic.

The applicant city relies rather strongly on the proposition that the proposed improvement is an exercise of the police power and that, therefore, it is distinguishable from similar situations involving federal aid highways. Exhibit No. 20, introduced in evidence, is a copy of General Administrative Memorandum 325 of the Public Roads Administration, Federal Works Agency, of the United States Government. This particular memorandum sets out the policy of the federal agency to be that the costs assessed against the railroad in such situations shall be based upon the benefits accruing to the railroad and, in no case, shall costs be greater than 10% of the total cost of the project. In the case of reconstruction of existing rail-highway grade separation structures, the memorandum states that such reconstruction "shall be considered as not resulting in ascertainable benefits to the railroad and, consequently, no contribution to the cost of such a project by the railroad shall be required."

We find that the situation presented in the matter before us is differentiable from those grade crossing and grade separation situations involving federal aid highways, since Washington Boulevard is a city street and no federal funds are to be used in the proposed widening.

Applicant city, in its brief, set out at some length the authority of this Commission to require grade separations and allocate the costs thereof. These contentions are not challenged and there is no question as to the jurisdiction and power of this Commission in this matter to allocate costs within legal and constitutional limitations. However, in considering these costs, a sound policy requires that the allocations be reasonable and equitable. We must take cognizance of present-day conditions, and in this particular instance we are impressed not only by the fact that the need for the proposed improvements is not brought about by any requirement of the railroad, but also by the fact that, but for the existence of the railroad at the location of the proposed street widening and the grade separation structures now there, the city would be able to widen its [fol. 166] street without the necessity of incurring the cost of replacing the existing bridge and underpass structures with the new structures proposed.

If the contention of the City of Los Angeles were to be sustained, then the railroad would be required to pay $475,300, that amount being the cost of the two proposed bridges and the structure wing walls and walls between the structures. The City of Los Angeles would be required to pay $246,300, that being the cost of the proposed improvements other than that cost necessitated by the existence of the railroad. We do not subscribe to this contention. Within its proper limitations, the police power of the City of Los Angeles is not challenged. However, we must also consider the fact that protestant railway has already paid its proportionate share of the existing structures.

The pavement under the existing underpasses is 20 feet in width and the proposal is to widen this so as to permit a 90-foot roadway thereunder, but, an analysis of other evidence presented in this record shows that the widening of these underpasses to 90 feet will not increase the traffic capacity of the street to that extent. The Washington Boulevard bridge over the Los Angeles River is only 56 feet in width and is located east of the underpasses and west of Soto Street, with no cross streets between the underpasses and this bridge. Accordingly, it is obvious that the

practical carrying capacity of the street beyond the underpasses would be limited to 56 feet.

In view of this situation, and in view of the evidence which indicates that the principal need for widening the underpasses is occasioned by traffic conditions on Washington Boulevard, we conclude that the proposed additional width of the underpasses, over and above 56 feet, becomes a matter of future city planning and will not contribute to the immediate traffic problem.

The Commission in *City of Los Angeles* Application No. 19063, Decision No. 25069, 37 CRC 784, at 796-7 said: "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease."

We believe that the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated. Therefore, in considering any allocation of [fol. 167] costs, the extent of the additional cost for bridge structures for the widening of the street over and above a 56-foot width should be allocated to the city.

As previously has been pointed out, the total cost of the proposed improvement will be $722,100, but the cost attributable to the presence of the railroad is $475,800. The remainder of the cost is clearly attributable to the paving and widening of the street. Of the proposed 90 feet of roadway, 20 feet is now available under the existing underpasses and the excess over 56 feet, or 34 feet, is attributable to future city planning. Therefore, this leaves but 36 feet of the proposed railway bridges, the costs of which are in any way attributable to the existence of the railway. These costs would amount to 40% of $475,800, or $190,320.

We conclude that this last-named amount is the only cost which should be allocated in this proceeding. In allocating this amount of $130,320 between the applicant city and the protestant railroad, we give effect to the factual situation as presented by the evidence in this case. A fair view of this evidence warrants the conclusion that each of the parties should defray one-half of this amount.

After considering all the evidence presented in this matter, we hereby find that public convenience and necessity have been shown to justify the widening of the existing grade separations, and we further find that there is a duty upon the protestant railway to defray a portion of the costs of such widening, as set out hereinabove.

ORDER

Application as above entitled having been filed, a public hearing having been held and the Commission being fully advised in the premises,

It is ordered that the City of Los Angeles be, and it hereby is, authorized to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch line and the main line railroads of The Atchison, Topeka and Santa Fe Railway Company in the manner and at the locations more particularly described in the foregoing opinion and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. The expense of constructing said undergrade crossings shall be borne by the City of Los Angeles with exception of the sum of $95,100, which amount shall be borne by The Atchison, Topeka and Santa Fe Railway Company.

2. In the event applicant elects to construct said undergrade crossings, the cost of maintaining those portions of the separations which, for the purpose of this decision, shall be referred to as the superstructures, which shall be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka and Santa Fe Railway Company. The re-

mainder of the maintenance of said structures shall be borne by applicant.

[fol. 168-174] 3. Prior to the commencement of construction, applicant shall file with this Commission for approval a set of plans for the proposed grade separation crossings which plans shall have been approved by The Atchison, Topeka and Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve such plans. In the event the said railway company refuses to approve such plans, this Commission may issue supplementary orders in this matter.

4. The crossing shall be constructed with clearances conforming to the provisions of General Order 26D of this Commission.

5. Applicant within thirty (30) days thereafter shall notify this Commission, in writing, of the completion of the installation of said crossings and of its compliance with the conditions hereof.

6. The authorization herein granted shall lapse and become void if not exercised within one year after the date hereof unless further time is granted by subsequent order.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 4th day of October, 1949.

Mittelstaedt, Craemer, Rowell, Huls, Potter, Commissioners.

[fol. 175] (File Endorsement Omitted)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title omitted)

ANSWER AND BRIEF OF THE CITY OF LOS ANGELES, A RESPONDENT AND REAL PARTY IN INTEREST, IN OPPOSITION TO ISSUANCE OF WRIT OF REVIEW—Filed August 12, 1952.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the State of California:

Pursuant to Rule 58(b) of the Rules on Appeal, the City of Los Angeles, real party in interest in the above-entitled matter, hereby files this its answer and brief in opposition to the issuance of writ of review in this cause.

[fol. 176] ANSWER

The City of Los Angeles, a municipal corporation, a respondent and real party in interest, answering petitioner's Petition for Writ of Review, ADMITS, DENIES AND ALLEGES as follows:

I.

Answering paragraph III, this respondent alleges that, in the 1932 proceeding, the Public Utilities Commission, by its Decision No. 25069, provided, in part, that "The entire expense of constructing said undergrade crossings, on the basis of a roadway width of fifty-six feet, shall be borne twenty-five per cent by The Atchison, Topeka & Santa Fe Railway Company and seventy-five per cent by applicant (City of Los Angeles)"; that, in its Decision No. 47344, the Commission provided that "Fifty per cent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street, shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the costs shall be borne by the City of Los Angeles"; that the cost to the City of Los Angeles to make the necessary improvement of Washington Boulevard, if the railroad were not present, would be $111,750; that the addi-

tional cost due to and resulting from the presence of the railroad is $701,015; that the total cost of the project is $812,765; that the Commission, in allocating costs, found that only the amount of $569,355 should be allocated, mak- [fol. 177] ing the share allocated to the Santa Fe $284,677.50; that had exactly the same method of allocation been adopted by the Commission in its Decision No. 47344 as was used in the 1932 decision the amount allocated to the Santa Fe would have been $203,191.25; that since 1932 the American Railway Engineers Association Official Specifications for Steel Railway Bridges increased from a Cooper's "Live Loading" of E-60 to an E-72, and therefore both of the existing structures are now substandard according to such standards; that the existing structures were approximately 20% depreciated in 1932, whereas they are now approximately 75% depreciated.

II.

Answering paragraph IV, this respondent alleges that Washington Boulevard is a city street, handling local traffic.

III.

Answering paragraph V, this respondent denies that the Commission unlawfully, arbitrarily, or unreasonably exceeded its authority, or its jurisdiction, or deprived Santa Fe of its constitutional rights, or any other rights, to due process or equal protection of the laws, or of its property without just compensation, or placed an undue burden on interstate commerce; and further denies that the Commission in any manner or in any way acted in violation of the Constitution of the United States of America, or any amendment thereto, or in violation of the Constitution of the State of California, or any section thereof, in any particular whatsoever, or at all.

[fol. 178] Furthering answering said paragraph, this respondent alleges that in all particulars and at all times the Commission acted pursuant to and in accordance with its powers and duties, and pursuant to and in accordance with applicable provisions of law.

Further answering said paragraph, which contains conclusions of law, argument, opinion, and assumptions of

ultimate facts, this respondent incorporates by reference the matters set forth in its brief.

Wherefore, this respondent respectfully prays:

1. That no writ of review be issued by this Honorable Court in this proceeding.
2. For its costs herein.
3. For such other and further relief as may be proper and just in the premises.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Roger Arnebergh, Assistant City Attorney, Attorneys for the City of Los Angeles, a Respondent and Real Party in Interest.

[fol. 179]. Brief in Opposition to Issuance of Writ of Review

Statement of Case

On June 4, 1948, the City of Los Angeles filed an application, numbered 29396, with the Public Utilities Commission of the State of California for an order authorizing and requiring the widening, increasing the vertical clearance and improving of the crossings of Washington Boulevard and the Harbor Branch Line and the Main Line railroads of The Atchison, Topeka & Santa Fe Railway Company, designating the portions of the work to be done respectively by said City and by said railroad company and allocating the cost thereof between said City and said railroad company.

After public hearing the Commission, under date of October 4, 1949, issued its Decision No. 43374, authorizing [fol. 179-1] the widening of the underpasses and allocating the expenses thereof between the City and the Railroad. The Commission held that, of the estimated total cost of $722,100, only $190,320 was in any way attributable to the existence of the railway. The Commission, giving effect to the factual situation, determined that the Santa Fe and the City should each pay one-half of the amount which the Commission had there determined to be the cost which was in any way attributable to the existence of the railway.

On November 22, 1949, the City filed a petition for rehearing based on the following grounds:

a. The decision was contrary to the law and the facts in that it assumed the City to be the principal beneficiary from the grade separations, and it disregarded the legal right of the City of Los Angeles to require the protestant, The Atchison, Topeka and Santa Fe Railway Company, to remove its tracks from city streets, at its own cost and expense, as established by the cases cited in applicant's brief theretofore filed in the proceeding.

b. The formula adopted (requiring each party to pay one-half of the allocable costs) was prejudicial to the City, would require the City to expend its funds for the benefit of the Santa Fe, and would unconstitutionally deprive the City of its property.

c. The failure of the Commission to order the Santa Fe to pay the full cost of that portion of the proposed improvement which is attributable to the presence of the railway tracks would result in unconstitutionally depriving the City of its property.

[fol. 179-2] d. That even if the formula requiring the Santa Fe and the City to each pay one-half of the cost of that portion of the proposed improvement which is attributable to the presence of the railroad tracks was proper, the formula was improperly and incorrectly applied and such application of the formula was contrary to and in conflict with the uncontroverted facts.

Thereafter, on December 2, 1949, the railroad filed a petition for rehearing, alleging that the costs should be assessed on a so-called "benefits" basis, and that to require it to pay one-half of the costs attributable to the existence of the railroad at the crossing was erroneous and contrary to the law.

The Commission, under date of March 28, 1950, issued its order granting a rehearing.

At the rehearing a stipulation was entered into to the effect that all evidence in the prior hearing be incorporated in the record on the rehearing. In addition, extensive additional evidence was produced by both parties.

Thereafter, the Commission, under date of June 24, 1952, issued its Decision No. 47344. In this decision the Commission referred to evidence showing that the estimate of the total cost of the proposed project had increased from $722,100, the estimate at the time of the original hearing, to $812,765, and that the cost to the City, if the railroad were not present, would be $111,750. The Commission, in its decision, likewise referred to other material evidence.

In its Decision No. 47344 the Commission determined that the estimated costs of the proposed structures which [fol. 179-3] may be said to be attributable to the presence of the railroad tracks for two divided span bridges (the recommended type of construction) was $569,355. Certain costs, such as for slope rights and storm drain, as well as costs for street work, etc., were held not to be properly allocable and were assigned in their entirety to the City.

The breakdown of the $569,355, found by the Commission to be allocable, is as follows:

Bridge aA-1	$234,000	
Bridge aA-144	246,200	
		$480,200
Retaining and wing walls		89,155
		$569,355

In neither the original decision nor in the decision on rehearing did the Commission order the railroad to pay 50 per cent of the cost of the proposed projects; in both decisions the Commission did order the railroad to pay 50 per cent of the costs which the Commission found to be properly allocable. The difference in the amounts which the railroad was ordered to pay under the first decision and under the decision on rehearing is due in part to increased estimates of total cost, and due in part to the Commission's including the full cost of the actual bridge structures as allocable costs. In the first decision only a part of the cost of the actual bridge structures was allocated.

Throughout the proceedings, the City of Los Angeles has contended that the Railroad should be required to pay that portion of the total cost which is attributable to the presence of the railroad tracks; that the proper basis of apportionment of the total costs is to assign to the Railroad the amount by which the presence of the railroad increases the cost of the necessary street improvement; and that the cost to the City of maintaining and improving its city streets should not be increased by reason of the presence of railroads running upon or across them.

The Railroad has contended that costs should be allocated according to benefits received by it; that it would receive no benefit from the proposed improvement; and that it should therefore pay no portion of the cost.

Evidence

The evidence as summarized by petitioner in its brief is quite comprehensive; however, certain additional evidence should be noted, and other evidence emphasized.

(a) Evidence Introduced at Original Hearing.

At the present time there are no facilities at all for pedestrian traffic (Tr. 35.)

If no proper allocation of costs of widening existing underpasses is made, then the City can build crossings at grade (Tr. 36) and trains would have to obey traffic signals. (Tr. 37.)

The City of Los Angeles has a right of way or easement for street purposes at the site of the grade separations, [fol. 179-5] which was acquired by negotiation and condemnation (Tr. 45), such right of way being 90 feet in width (Tr. 49).

The cost of widening the roadway by elimination of the existing underpasses and making the crossing at grade would be $345,000. (Tr. 54.)

To accomplish the necessary widening of Washington Boulevard by a grade crossing would mean delay to both vehicular and rail traffic, and would be an added accident hazard. (Tr. 58.)

That while the plan to widen the underpasses had its inception with the City of Los Angeles, the Santa Fe sug-

quoted that if the widening of the underpasses be accomplished, it should be accomplished by the use of bridges such as provided for by the Commission decision. (Tr. 78.)

That in 1910 Los Angeles had a population of 102,000 (the underpasses were first constructed in 1914); in 1920 the City had a population of 576,000; in 1940 it had a population of 1,987,000. In 1910 the County of Los Angeles had a population of 504,000; in 1943 it had a population of over 4,000,000. (Tr. 82-83.)

In 1942, within a five-mile radius of the crossings here involved, there were more than 1,150,000 people, and within a ten-mile radius there were more than 2,500,000 people. (Tr. 84.)

(b) Additional Evidence Introduced on Rehearing.

In addition to the evidence introduced at the original hearing, which by stipulation was deemed introduced at the rehearing, the following is in evidence:

Unlike a freeway, which only serves to carry traffic, a street such as Washington Boulevard has a tremendous [fol. 179-6] function in serving the properties fronting on the boulevard; freeways are entirely supplemental to the city street system and do not reduce the need of the existing street system which handles local traffic. (Tr. 97.)

A very small percentage of traffic on Washington Boulevard is through traffic that enters one end of Washington Boulevard and goes out the other end of Washington Boulevard (Tr. 102, 105.)

Mr. Jenkins, a company witness who testified at length as a consulting engineer, testified that in his opinion such office building and bridge presents a hazard similar to a grade crossing because people could wilfully take advantage of the height to bring about self-destruction (Tr. 319), although he later admitted that "there is no escaping the fact that railroad crossings constitute a hazard to life and property at the present time." (Tr. 322.)

He further testified that under present traffic conditions street traffic presents a hazard to trains, which was "extremely serious," and that the elimination of such hazard was an advantage to the train. (Tr. 324-5.)

He also testified that in computing "benefits" resulting from grade separations the delay factor should be given considerable weight (Tr. 331); that the Railroad receives

benefit, because of this delay factor, in the elimination of grade crossings (Tr. 332), but that the so-called Johnson formula, used for determining benefits resulting from grade crossing elimination, does not go into the delay to rail traffic at all! (Tr. 332.) He likewise testified that he gave no valuation at all to the delay factor, insofar as determining benefits to the Railroad was concerned, because he couldn't visualize a procedure whereby an existing grade separation would be improved, instead of first applying [fol. 179-7] for a grade crossing, and then applying for a grade separation. (Tr. 309-310.)

He further testified that a main line railroad couldn't operate under signalized or synchronized control of traffic, such as that under which vehicular traffic operates. (Tr. 334-337.)

In Mr. Jenkins' Exhibit R. H. 29, page A-21, it shows that for the 25 grade separations in 1931, the latest year listed, the share of the cities involved was $600,344 out of a total cost of $3,167,086, or less than 20 per cent. (Tr. 342.)

Mr. Jenkins also testified that there were heavy industries in the area here involved, and that there was local traffic from such industries using Washington Boulevard. (Tr. 412-414.)

Likewise he admitted that probably 100 per cent of all passenger traffic handled by railroads use city streets at some stage of their journey, so that city streets are feeders and used as feeders for the railroad business, and that a comparable situation largely exists with respect to freight, except that there is a larger percentage of freight served directly by spurs which do not involve truck connection. (Tr. 414-415.)

He likewise admitted that the mere presence of a truck doesn't prove competition with a railroad, but instead the truck might be feeding the railroad, rather than competing with it. (Tr. 415.)

He further admitted that a crossing at grade would be a detriment to the Railroad. (Tr. 420.)

[fol. 179-8] Mr. Jenkins' Exhibit R. H. 29 (p. 73) shows that in 19 states the allocation of costs of grade crossings is fixed by state agencies, apparently solely at the discretion of such state agencies, except that in Connecticut a rail-

road is assessed between 50 per cent and 100 per cent for projects not on a state highway system. In 18 states the allocation to railroad is fixed at not less than 50 per cent. While petitioner in its brief states that this group consists primarily of southern states, it is interesting to note that included in such group are Kansas, Maine, Oklahoma, Pennsylvania, Vermont, and Washington.

Mr. Grey, another company witness, testified that since 1900 there has been a very substantial increase in the business done by the Santa Fe, freightwise, over the lines using the tracks here involved; that where there is a series of tracks such as here involved, and assuming an automobile and train collision, there would be considerable expense and delay and disruption of scheduling, which would not be reflected in claim payments (Tr. 483); that in such accidents considerable damage is done to the Santa Fe equipment, such as when a truck collided with the Super Chief, damaging Santa Fe equipment about $150,000 and delaying the train about two hours; that a serious delay influences movement of traffic in either direction, not only at the point of the accident but further on down the line (Tr. 484); that the tonnage now handled over these tracks is up, even greater than in 1928 or 1929 when volume was very heavy (Tr. 492); that the San Diego line, which uses these tracks, is a very good passenger earner (Tr. [fol. 179-9] 494); that the diesel locomotives now being used handle longer trains with more tonnage, which is a benefit to the Railroad, and the longer the train the better for the Railroad, regardless of the fact that such longer trains would block grade crossings for a longer period of time. (Tr. 495.)

Mr. Terras, another company witness, admitted that the Cooper's Loading of the existing structures was E-56 and E-65, and that the bridges are depreciated over a period of 50 years. (Tr. 522.)

Through Mr. Crowley, Southern California Representative of the League of California Cities, Exhibit 53 R. H., was introduced in evidence, such exhibit being a copy of Resolution adopted by the League of California Cities approving a formula of allocating grade separation costs whereby the municipality would pay the amount it would cost to improve the street if there were no railroad tracks

involved, and the railroad would pay the costs occasioned by the presence of the railroad tracks.

Mr. Springer, a City witness, presented evidence (Ex. 61 R. H.) and testimony showing that in 1943 the recommended Cooper's Loading for railway bridges was increased to E-72 (Tr. 581) and that both the existing structures here involved are substantially below present standards. (Tr. 583.)

Mr. Winter, another City witness, presented Exhibit 62 R. H., which is a land use map showing the general use of property fronting on Washington Boulevard in the vicinity of these underpasses. This shows the extensive use of Washington Boulevard for local traffic, including some 450 vehicles entering or leaving the Santa Fe yards in a 24-hour period. (Tr. 591.)

[fol. 179-10] ARGUMENT.

POINT I.

The Public Utilities Commission Has the Exclusive Power and Duty to Allocate Costs of Grade Separations.

Article XII, section 22, of the California Constitution provides, in part, that:

> "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Article XII, section 23, provides, in part:

> "* * * The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities fur-

nished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution."

Pursuant to such constitutional provisions the Legislature enacted the Public Utilities Act, now incorporated [fol. 178-11] in the Public Utilities Code. Section 1202 of the Public Utilities Code reads as follows:

"Sec. 1202. Exclusive powers of commission. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

The California Public Utilities Commission, in its Decision No. 47344, from which decision petitioner is seek-

[fol. 179-12] ing a writ of review, clearly set forth the law when it stated:

"There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional costs of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. Ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161.)"

[fol. 179-13] PART II.

In the Absence of Constitutional or Valid Statutory Limitations, the State and Its Duly Authorized Political Subdivisions Have Full Power and Authority, Both at Common Law and Under the Federal Constitution, to Require Separation of Grades at Crossings of Public Streets and Highways by Railroads and to Require the Railroads to Pay as Much as the Entire Cost Thereof and to Repair and Maintain the Separation

Structures After Their Construction. This Is a Proper Exercise of Police Power by or on Behalf of the Sovereign.

In the case of *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254 U. S. 394, 65 L. Ed. 322, an order had been made by the Board of Public Utility Commissioners of New Jersey requiring the Erie Railroad to install grade separations at fifteen street crossings in the city of Paterson. Fourteen of these crossings were required to be made by means of underpassed streets and the fifteenth by means of a viaduct carrying the street over the railroad. The order required the railroad company to pay the *entire* cost of *all* of these separations, with the exception that 10% of the cost was required to be borne by a streetcar company which occupied three of the crossings. Most of the streets involved were laid out later than the railroad tracks. The railroad company insisted that compliance with the order would result in its bankruptcy and attacked the order on the grounds that it was unreasonable, arbitrary and a violation of the due process and interstate commerce clauses [fol. 179-14] of the federal constitution. In affirming the order the Supreme Court of the United States, speaking through Mr. Justice Holmes (254 U. S. 410, 65 L. Ed. 333), said:

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That

is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down wherever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. (Citing [fol. 179-15] cases.) To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. (Citing cases.) If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. (Citing cases.) Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous."

In *Cincinnati, I. & W. R. Co. v. Connersville* (1919), 218 U. S. 336, 54 L. Ed. 1064, the railroad maintained an embankment across Grand Avenue in the city of Connersville, Indiana, and thereby blocked passage between the northerly and southerly parts of the street. The city council adopted a resolution that said avenue should, as a matter of public necessity, be opened as a public street through the railroad embankment and proceeded to condemn a street easement through the embankment for the full width of the avenue. At a trial by jury compensation was awarded to the railroad only for the land thus condemned. The trial court

instructed the jury that it was the duty of the defendant railroad company to construct and keep in safe condition all highway crossings and that the railroad would not be entitled to any damages for constructing the necessary crossing or abutments and bridge for supporting its railroad over and across the street when constructed. The trial court refused to instruct the jury that in considering the railroad's damages it should take into account the cost to the railroad of constructing a bridge to carry its rail-[fol. 179-16] road over the proposed street. No award was made for the cost of such bridge, etc. Thus the city bore the expense of the construction of the street and the railroad was required to install the necessary bridge to carry its tracks. The judgment was affirmed by the Supreme Court of Indiana and upon appeal to the Supreme Court of the United States was again affirmed. On such appeals the railroad company contended that the police power of the state cannot be so applied as to require the railroad company to build the bridge without compensation. In affirming the judgment, the Supreme Court of the United States, speaking through Mr. Justice Harlan, said (218 U. S. 242, 54 L. Ed. 1064):

"If the railway company was not entitled to compensation on account of the construction of this bridge, —whether regard be had to the 5th or the 14th Amendments of the Constitution, or to the general reserved police power of the state,—then it is clear that the jury were not misdirected as to what should be considered by them in estimating the damages which, under the law, the railway company was entitled to recover.

"The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court; particularly by *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 582, 584, 591, 50 L. ed. 301, 305, 306, 308, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *New Orleans Gaslight Co. v. Drainage Comrs.*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 571,

38 L. ed. 935, 274, 14 Sup. Ct. Rep. 827; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 254, [fol. 170-17] 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581; *Northern Trust Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336. See also *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367. The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.' *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465, 470."

In *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, the city of Minneapolis had acquired certain property for park purposes which included two lakes in their entirety and a portion of the shores of a third lake, together with large tracts of land in the vicinity. It proceeded to construct two canals connecting the three lakes, together with walks on either side thereof. The railroad owned a right of way 100 feet wide which crossed the path of one of the proposed canals and the city sought to condemn an easement for this canal [fol. 170-18] and its lateral walks across this right of way. The railway tracks at the point in question were located on an artificial embankment 18 feet above the water level of the lakes. It was agreed that the city should take the land and construct the canal and walks and that the railway company should build the bridge according to plans

prepared by the city, but the railway company reserved its right to recover damages or compensation in the condemnation action and claimed, in addition to the value of the land taken (which was paid), that it should be compensated for the entire cost of the necessary bridge across the canal and such further sum as would be sufficient to maintain the bridge. The judgment in the condemnation case awarded to the railroad only the value of the land taken together with the cost of certain features of the bridge which were purely ornamental. In affirming the judgment the Supreme Court of the United States, speaking through Mr. Justice Hughes, said (232 U. S. 437, 58 L. Ed. 674):

> "The question thus presented is whether the refusal to allow compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.
>
> "*It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. . . .*" (Emphasis ours.)

[fol. 179-19] Quoting from a Minnesota case the court proceeds:

> "'A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and high-

ways in existence when the railroad was constructed.' . . . (Citing cases.)

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (citing cases); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Missouri Pacific R. Co. v. Omaha* (1914), 235 U. S. 121, 59 L. Ed. 157, the city of Omaha by ordinance required the railroad to construct a viaduct over its line at its intersection with Dodge Street, together with ap- [fol. 179-20] proaches thereto along the southerly line of Dodge Street, leaving the northerly side of the street open to public traffic. The ordinance required construction of the viaduct in accordance with plans and specifications prepared by the city engineer. The railroad brought this action in the federal courts. The Circuit Court (which was then the federal court of original jurisdiction) dismissed the bill and this decree was affirmed both by the Circuit Court of Appeals and the Supreme Court of the United States. The latter court, speaking through Mr. Justice Day, said (235 U. S. 127, 59 L. Ed. 160):

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed

as above, is well settled by prior adjudications of this court. (Citing cases.)

"This is done in the exercise of the police power and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. (Citing cases.)"

In *Lehigh Valley R. Co. v. Board of Public Utility Comrs.* (1928), 278 U. S. 24, 73 L. Ed. 161, the railroad sought to enjoin enforcement of an order made by the [fol. 179-21] Board of Public Utility Commissioners of New Jersey requiring the railroad to eliminate two railroad grade crossings and to substitute in their place a single overhead crossing at the *sole expense of the railroad company* in the amount of $324,000. In addition to raising the usual constitutional objections, the railroad claimed that an adequate crossing could be built for at least $100,000 less than the amount it was required to expend under the order and also claimed that the order unconstitutionally imposed a direct burden on interstate commerce and violated the interstate commerce law in that the required expenditures exceeded the legal duties of the railroad and the reasonable requirements of public safety and convenience. The case was instituted in the United States District Court and was heard by a three-judge court which dismissed the bill. On appeal the Supreme Court affirmed the decree of dismissal and, speaking through Mr. Chief Justice Taft, said (278 U. S. 33, 73 L. Ed. 166):

"This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadways most desirable. The large expenditure to secure such

advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.

"It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the im-[fol. 179-22] provement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant.

* * * * * * * * *

(278 U. S. 34, 73 L. Ed. 167): "A railroad company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. (Citing cases.) This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.

* * * * * * * * *

(278 U. S. 35, 73 L. Ed. 167): "The care of grade crossings is peculiarly within the police power of the states (citing cases), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly [fol. 179-23] not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear."

So zealously have the courts guarded the police power of the states and their political subdivisions with respect to railway crossings of highways that they have held in numerous cases where municipalities have by contract agreed with railway companies to pay the expense of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away." See for examples: *Chicago M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, and *Northern Pacific R. Co. v. Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. Ed. 630. In the latter case the court, speaking through Mr. Justice Day, said (208 U. S. 596, 52 L. Ed. 636):

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. (Citing cases.) . . . We find no error in the judgment of the Supreme Court of Minnesota holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed."

[fol. 179-24] Many other decisions both by the Supreme Court of the United States and by state courts of last resort might be cited in support of this point. The courts are practically unanimous in announcing the law to be as the above cited and quoted cases declare it.

Point III.

The Power and Right of the States and Their Political Subdivisions to Require Separation of Grades Between Railroads and Highways or Streets and to Require the Railroads to Pay All or Any Part of the Cost Thereof Extends to and Includes the Right to Require Railroads to Pay All or Any Part of the Cost of Altering or Reconstructing Existing Grade Separation Structures.

The courts have had no difficulty in extending the application of the rule announced in Point II to cases where, by reason of the demands of increased traffic, an existing grade separation has become inadequate and it has become necessary to widen or otherwise enlarge either an underpass or a viaduct carrying the highway or street, and the state has cast all or a part of the financial burden upon the railroads. Many of the cases hold that statutory authority, such as we have in Section 1202 of our Public Utilities Codes, conferring jurisdiction over railroad-highway crossings upon a regulatory body, such as the Public Utilities Commission, include and grant to such bodies the power to require alteration or reconstruction of existing grade separation structures. In *New York C. & St. L. R. Co. v. Singleton* (1934), 207 Ind. 449, 190 N. E. 761, the Supreme Court of Indiana, in affirming an order of the Public Service Commission of that state directing the railroad to reconstruct and widen a highway underneath [fol. 179-25] its tracks, at its own expense, quoting from the opinion of the Public Service Commission, which in turn quoted the case of *Southern Indiana R. Co. v. McCarrell*, 163 Ind. 469, 71 N. E. 156, said: (1904)

> "'The public does not lose control of public highways by reason of railroad crossing construction. Duties of railroad companies to the public do not end with construction of the crossing. That does not re-

leave the railroad from necessary, future obligation; the obligation is continuing. The adequacy of the crossing to accommodate the public must be made to meet the reasonable demands of the times. . . .'"

In *State ex rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S. W. 2d 55, the Supreme Court of Missouri, in upholding an order of the Public Service Commission of that state requiring the railroad to pay half the cost of replacing an old steel and wood viaduct over a railroad, said:

"It is also contended here, by the railroad, that the commission's order is unfair, unreasonable, and unjust because this was not a grade crossing and because the present bridge was adequate and no reasonable necessity for the project was shown. The railroad contends that for a town of 753 people no better bridge is necessary. We cannot agree with this contention. The present bridge was built in 1900; its narrow travel space, its small load capacity, and its 'camel-hump' construction would seem to classify it as a relic of those 'horse and buggy days.' Jackson county has more than doubled in population, as have its principal cities, Kansas City and Independence, since this bridge was built. Even Blue Springs and its neighboring small towns have considerably increased in size; but of greater significance than this [fol. 170-26] remarkable growth in population has been the development of modern motor transportation and the increase of traffic caused thereby during the existence of this old bridge. Whether the amount of traffic developed by the greater population of Jackson county and the 'motor age' required a new concrete slab from United States highway 40 through Blue Springs to the Independence road was not for the consideration of the Public Service Commission. (Citing cases.) But, the county having decided to build such a road, the question of the place and manner of its crossing, which the welfare and safety of the public required, was for the commission alone to decide. Section 5171, R. S. 1929 (Mo. St. Ann §5171,

p. 6685.) The modern 18-foot concrete pavement which is being built to this bridge would seem to require more than its less than 16-foot width to make the crossing safe for the traveling public."

In *State ex. rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S. W. 2d 57, the same court, in upholding an order of the Public Service Commission authorizing the widening of a concrete viaduct over a railroad, said (70 S. W. 2d 60):

"The state has the right to build its other public highways, for travel by other means, over across, or under the railroad. To accommodate such travel, it has the right to build new roads across railroads at new places and provide for the necessary kind of crossing, or to widen existing roads and alter such crossings already established, as the public interest may in either case reasonably require. *If it did not it would no longer be the sovereign.* To exercise its police power for the preservation of the public safety, this state has through the Legislature designated the [fol. 179-27] Public Service Commission as the exclusive agency to determine and prescribe the manner and point of new crossings and to alter or abolish established crossings, apportion the expense, either of making new crossings or alterations of existing ones, and to provide for their maintenance.

"'*Salus populi suprema lex est*' is the fundamental principle of the police power of the state, as well as our state motto. Private corporations, accorded the privilege of operating railroads, declared to be public highways of the state, for the purpose of private profit, must pay a reasonable proportion of the cost of improvements, which the presence of their tracks make or contribute to make necessary, for the welfare and safety of the people of the state. We therefore hold that the Public Service Commission has the authority not only to provide for a separation of a grade between a public highway and a railroad, when conditions make that necessary and proper, but that it also has the power, whenever the manner of cross-

ing formerly prescribed by it becomes inadequate in width, height, or strength, to reasonably provide for the safety and welfare of the traveling public thereon, to order it reconstructed to meet their reasonable needs." (Emphasis added.)

The basis of the rule which requires railroads to keep pace with the needs of increased traffic on highway crossings of their tracks by repairing or, if necessary, replacing old grade separation structures, is well stated in the case of *St. Paul v. G. N. R. Co.*, 177 N. W. 492, 145 Minn. 355, as follows:

"The railroad's interference with safe public travel is continuous and the obligation of the railroad to [fol. 179-28] conserve the safety and convenience of the public, imposed under the police power, is as continuous as its interference with safe public travel. * * *

"We hold that the uncompensated duty rests upon the railroad to keep the surface of its bridge in fit condition for public travel; that the duty is cast upon it in the exercise of the police power; and that requiring it to furnish at its own cost an appropriate surface for travel is not the exercise of the taxing power and does not offend any provision of the federal Constitution."

Again, in the case of *Boston and M. R. Co. v. County Commissioners of Middlesex Co.*, 131 N. E. 283, 286, 239 Mass. 137, the Supreme Judicial Court of Massachusetts states the same rule as follows:

". . . . It is long since settled that the obligation of a railroad not to obstruct at a crossing the use of a public way is a continuous one, not measured by its duty when the way was located, but one that enlarges to meet the statutory requirements that public ways shall be kept reasonably safe and convenient for travelers at all seasons of the year . . . ."

The California Public Utilities Commission has for many years recognized the principle that the state has the right and power to impose upon a railroad all or any part of

the cost of reconstructing inadequate grade separation structures.

Town of Larkspur, 37 C. R. C. 901, 905;
People ex rel. Department of Public Works, Public Utility Reports, 1923 D. 545.

[fol. 179-29] PART IV.

There Is No Logical or Legal Basis for the Contention That the Costs of This Grade Separation Improvement Should Be Borne by the Parties Respectively in Accordance With the Benefits to Be Received by Them, nor Are Any Such Benefits Mathematically Calculable.

Petitioner contends that the costs in the case should be allocated on the basis of respective benefits because, they say, this is the method of allocation of the costs of grade separations when highway construction is financed under the Federal-Aid Highway Act of 1944.

In this contention the petitioner wholly fails to recognize the essential distinction between the present case and that of highway construction under Federal-Aid Acts. The instant case represents an exercise of the police power by a municipality in its right to maintain and improve a public street, and the exercise of the police power by the State Public Utilities Commission in allocating expenses of widening existing grade separations, such widening being required by the public safety, convenience and necessity. The improvement is not to be financed in any part with federal aid funds.

The fact that the Federal-Aid Highway Act of 1944 and its predecessor acts limit, and in some cases eliminate, the imposition of any charge upon railroads for the cost of grade separations or modifications thereof is of no consequence here. That act does not represent an exercise of the police power by a sovereign state, but is merely an instance of a voluntary and benevolent expenditure of public funds for the benefit of the public and the various states. Obviously the Federal Government, being subject to no applicable constitutional limitations in such cases, is [fol. 179-30] free to prescribe any conditions or limitations it chooses to place upon the distribution of any such gra-

tuition. Any state not desiring to accept the federal aid subject to the prescribed conditions and limitations is free to so refrain. Moreover, if such gratuities were to be conditioned upon the imposition upon the railroads of their fair share of the cost of grade separations, the very objective of the Act would have been defeated.

We are quite sure that the petitioner has been misled by this policy of the Federal Government and has thus fallen into the error of believing that the police power of the states and municipalities has thereby been curtailed to fit the pattern of federal generosity. Such a concept is utterly foreign to the fundamental principle of our dual separate systems of government.

In addition to the foregoing, the courts have upheld our position in the few cases in which the question of relative benefits has been presented to them where no federal aid was involved.

In the case of *State of Missouri ex rel. Wabash R. Co. v. Public Service Comm.* (Mo. 1936), 100 S. W. 2d 522, 109 A. L. R. 754, where the Public Service Commission of the State of Missouri assessed against the railroad 40% of the cost of an elaborate grade separation through a public park, the Supreme Court of Missouri in sustaining this order, said (100 S. W. 2d 527):

"The Wabash argues strenuously that the separation of the grade was made primarily for the convenience and benefit of the traffic on the highway and that the per cent of cost of the improvement assessed against the railroads was grossly out of proportion to benefits received by them. . . . It is evident from the findings of the Commission, which were [fol. [illegible]] amply supported by the evidence, that due to crossing gates maintained by the Wabash the crossing was not very dangerous. The heavy traffic on the highway was compelled to stop for passing trains. This caused considerable delay, inconvenience, and so-called traffic [illegible], and materially interfered with the free use of the highway. By the law of necessity all traffic on a highway must give railroad trains the right of way. . . . This is not such a case, but suppose a crossing was considered

[redacted]

existing subway was found inadequate and the major portion of the cost of enlarging the structure for the

sole purpose of accommodating the travel upon the streets that crossed against the railroads. This court in the course of the opinion said: "[T]he [illegible] safety of passing trains is only one of the elements to be considered in matters of this kind. It is not the sole or controlling element. The convenience and necessities of the traveling public using highways, streets and thoroughfares is considered. We are not discussing a principle, however, where cases and cases where the presence of a railroad renders a street inadequate to accommodate the traveling public." (Emphasis added.)

In the case of *State ex rel. Chicago, R. I. & P. Ry. Co. v. Public Service Commission* (Mo., 1924), 73 A. V. R. 191, the Supreme Court of Missouri, in sustaining an order of the Public Service Commission dividing the costs of re-constructing an old highway underpass equally between [Fol. 179-23] the county and the railroad, said (73 A. V. R. 191):

"[I]t the contention that the whole cost of the re-construction of the grade separation should be borne by St. Louis county because safety will dictate it should, we may say in the words of the court, used in *State ex rel. Kansas City Southern Ry. Co. v. Public Service Commission*, 305 Mo. 668, 267 S. W. (2d) 113, loc. cit. 119: 'There is no question of expenditure of funds in the case. It is a question of providing for the public safety by reasonable methods. The results will inure to public good in the manner which the Commission, in what was deemed in the lower court a reasonable way, has undertaken to provide. The matter involving [illegible] between the approaching trains was reasonably safe in that day. But in this day of motor vehicles it is full of perils of collisions of automobiles with each other as well as with the trains. Expert witnesses for the county and for the railroad testified to these hazards."

In the case of *Lehigh & N. E. R. Co. v. Public Service Commission* (1927), 191 Atl. 880, 882, the Superior Court of Pennsylvania, in approving an order of the Public

Service Commission of this state requiring the construction of an elevated and underground railroad and abolishing the grade crossings within the county and the city and, said:

"The order of the commission was within its power and supported by the evidence and is reasonable and in conformity with law.

"Those conditions which may have brought about the necessity for a new underpass do not continue to subsist indefinitely. It is a question of providing for public convenience and necessity. The underpass [illegible] may [illegible] at any time become inadequate or unsuitable for the purpose for which it was originally intended. In order to protect the public in the enjoyment of its rights, it may be necessary, if the facts warrant it, that the underpass shall be appropriately changed. Appellant's contention that it will receive no benefit from the proposed construction is not convincing. The question of benefits is not involved. It is the existence and operation of the grade crossings, and the hazards incident thereto, which [illegible] on the railroad." Lehigh Valley R. R. Co. v. Public Service Comm., 105 Pa. Super. 428 at page 434, 163 A. 468 at page 470."

It seems to the railroad were a relevant consideration in this case, the writer will point out that it would be within the constitutional power of the sovereign State of California, acting through the Public Utilities Commission, to order that crossing to be abolished as grade and to be elevated to the full width of the street, compelling the writer to accommodate the increased flow of the vehicular and pedestrian traffic. Then, for reasons of safety and giving due consideration to the needs of both railroad and street traffic it would be necessary at times to stop either the railroad traffic or the street traffic. The resulting delays to the railroad as well as the increased hazard of accident and consequent possible liability of the railroad for public injuries would be incalculably great. With respect to the likelihood of public liability of the railroad for accidents the words of Mr. Justice Holmes in the case of *Erie R.*

Co. v. Bor'd of Public Utility Comrs., 254, U. S. 394, 413, 65 L. Ed. 322, 335, are characteristically pertinent and concise:

> "If we could see that the evidence plainly did not warrant a finding that the particular crossings were [fol. 179-35] dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone we well might hesitate. *But the situation is one that always is dangerous.* The board must be supposed to have known the locality, and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. *The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change.*" (Emphasis added.)

In petitioner's Point IV reference is made to the case of *Lehigh Valley Rd. Company v. Board of Public Utility Commissioners* (1928), 278 U. S. 24, 73 L. Ed. 161, 167. In our Point II we fully discussed that case, so here it is sufficient to state that in that case the Supreme Court of the United States sustained the action of the Commission in requiring the railroad at its sole expense to provide a grade separation. The language to which petitioner referred on page 38 of its brief had to do with the type of structure ordered, not the allocation of 100 per cent of the cost to the railroad. Further, even with respect to that matter the Supreme Court held that it was not for the court to cut down the expenditure merely because more economical ways suggested themselves. However, in the instant case this point is not even involved because the City acquiesced in using the type of structures which were most satisfactory to the petitioner.

The Nashville Case.

Petitioner stresses the case of *Nashville, C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949. In considering that case it should first be emphasized that,

[fol. 179-36] as shows by the findings of the trial court, quoted by the Supreme Court, (1) "this underpass is a part of a state-wide and nation-wide plan to foster commerce by motor vehicles on the public highways, the result of which is to afford competition with railroads and that the decision to build this underpass, its location and construction, was not in any proper sense an exercise of the police power, * * *"; (2) "the State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. * * *" Such finding further emphasizes that "the immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails. The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed."

Finding No. 2 again refers to Federal-aid highways and their incidents. Finding No. 4 shows that "'Lexington is a rural community of 1823 inhabitants located in a sparsely settled territory. The construction of the new highway with the underpass was not designated to meet local transportation needs. It was undertaken to serve as a link in a nation-wide system of highways."

Finding No. 5 shows that "the underpass required is for a new and additional highway over which State Highway No. 20 is being rerouted, which will be a part of the Federal-aid route between Nashville and Memphis, * * *"

Finding No. 6 shows that "the new highway, paralleling lines of the Railway and intended for rapid moving motor [fol. 179-37] vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the Railway's revenue and net earnings. Practically all vehicles moving upon it will directly or indirectly compete for traffic with the Railway."

Finding No. 7 shows that the railroad was to pay one-half directly and a portion of the other half indirectly; that a portion was to be paid by Federal aid, and that only a very small portion was to be paid by the truck and bus owners who would use the facilities.

It will be noted that none of these conditions are present

in the present case. We are not presently concerned with an underpass which is part of a nation-wide system being constructed pursuant to a nation-wide plan to foster commerce by motor vehicles. Instead, we are concerned with a City street handling local traffic, where the separation is necessary in the interest of the public health, safety and general welfare. It is not a Federal-aid highway, nor even a State highway, but is a City street to be constructed with City funds. The street here involved is designed to meet local transportation needs of a City having a population of over 2,000,000, as distinguished from a highway which forms part of a nation-wide highway system, and which highway incidentally passes through a rural community of 1623 inhabitants. It is not designed for the purpose of providing a nation-wide system of highways to foster commerce by motor vehicles in competition with railroads, nor does it parallel the Railroad. Instead, the evidence shows clearly that the primary purpose is to provide for local transportation needs. It is not being constructed by Federal-aid money, but by the City with City funds. It is not a [fol. 179-38] "make-work" project to relieve unemployment, but instead a necessary improvement of a City street.

In other words, the grade separation here involved is one which is, in its proper sense, a valid exercise of the police power necessary to protect the public health, safety and general welfare.

It is plainly apparent that the *Nashville* case can have no bearing on the problem here presented.

Cases more recent than the *Nashville* case clearly establish that such case was not a reversal of the many prior cases holding that a railway could be required to pay up to 100 percent of the cost of a grade separation. Instead, the *Nashville* case is applicable only to the factual situation there presented.

The case of *Lyford v. State of New York*, 140 F. 2d 840, decided in 1944, involves a claim of the State of New York against an insolvent railroad. The claim arose under the New York Grade Crossing Elimination Act of 1926:

> "* * * This act empowered the State Public Service Commission to order the elimination of any grade crossing which in the Commission's opinion was a

menace to the public safety. Half the cost of the elimination was to be borne by the railroad whose crossing was to be eliminated, half by state and county governments, in the proportion of 49 per centum by the State and one per centum by the county or counties in which the crossings were located. If the railroad so elected, the State was authorized to pay the railroad's share in the first instance, the railroad being obliged to repay the State in a manner to be determined by the State comptroller, so that the principal and interest of the State debt incurred for such elimination might be repaid when due." (Pp. 841-842.)

[fol. 179-39] Under these provisions the railroad became indebted to the State in the amount of some $425,000. Thereafter the railroad filed a voluntary petition for reorganization under Section 77 of the Bankruptcy Act. A claim was filed by the State and the question was raised as to the validity of such claim.

In holding the claim valid, the court stated (p. 844):

"* * * It is well settled that in the exercise of its police power for the protection of its citizens a state may require of even an interstate railroad that it abolish grade crossings at its own expense entirely, whatever the cost and without regard to its financial ability. See extensive discussion by Holmes, J., in *Erie R. Co. v. Board of Public Utility Com'rs*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 323, citing earlier cases; * * * (citing cases). *Hence this duty which could have been required of the railroad alone, is here shared* with the state and county governments; and the additional privilege of installment repayment is also granted, but only upon conditions carefully safeguarding the interests of the State." (Emphasis added.)

A petition for a writ of certiorari to the United States Supreme Court was of course denied. (323 U. S. 714, 89 L. Ed. 574 (1944).)

This recent case gives no indication of any "trend" claimed by petitioner, and we again wish to emphasize that

the *Nashville* case, by its very terms, turns upon a finding that the elimination of the grade crossing there involved [fol. 179-40] "*was not in any proper sense an exercise of the police power,*" (79 L. Ed. 949, 956, 304 U. S. 405, 417), and was to a large degree an expenditure "*for the relief of unemployment*" (79 L. Ed. 949, 957, 304 U. S. 405, 418-419).

The matter involved in the *Lyford* case was again before the Court in *State of New York v. Gebhardt*, 151 F. 2d 902, certiorari denied 327 U. S. 788, 90 L. Ed. 1015.

Of course, it should also be mentioned that here again State highways and State funds were involved, rather than a city street. The railroad's obligation, as heretofore shown, is much greater when city streets are involved. This is undoubtedly the basis of the later amendment to the New York Act.

A case decided at approximately the same time as the *Nashville* case is that of *In re New York O. & W. Ry. Co.*, 280 N. Y. Supp. 174 (affirmed 3 N. E. 2d 188). That case clearly indicates that the true rule is whether or not the public benefits; if so, the grade crossing may be eliminated regardless of benefit to the railroad, and the railroad can constitutionally be required to pay the entire cost, although in that case the statute only required the railroad to pay one-half of the cost.

Again in 1937, in the case of *In re Elimination of Highway-Railroad Crossings*, 299 N. Y. Supp. 693, the railroads were required to pay one-half of the cost, as provided by statute, regardless of the fact that "the New York Central urges two objections to the order. It insists that it not [fol. 179-41] only derives no benefit whatever from the new construction, but that it is decidedly damaged by reason of the change," especially in view of the fact that there was already an underpass under its tracks and that the new alignment would require its patrons to travel some 7000 extra miles each year to reach its station.

Incidentally, it might be mentioned that included in the cost of that grade separation was the cost of paving some 3,332 feet of new highway outside the subway itself.

There is, of course, a fundamental difference between a crossing separation which is a "make-work" project,

using Federal funds, and a crossing separation which is admittedly necessary for the public health, safety and general welfare; or between a grade separation for private benefit, and a grade separation required by the public health, safety and general welfare. An analysis of the cases will show that regardless of direct benefit, the Railroad "has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks both at grade and at separated grades." (37 C. R. C. 787.) Further, "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways." (*Erie R. Co. v. Board of Public Utility Com'rs* (*supra*), 254 U. S. 394, 409, 65 L. Ed. 322, 333.) The element of direct benefit is absolutely immaterial.

[fol. 179-42] POINT V.

THE SO-CALLED BENEFITS THEORY.

Petitioner's principal position appears to be that of advocating an allocation of expenses on the so-called benefits theory. We do not subscribe to this theory for many reasons: (1) it is impossible to compute real benefits with any degree of certainty; (2) it completely disregards the legal rights of the City of Los Angeles to use its streets free from obstruction or interference; (3) it further disregards the legal obligations inherent in the operation of the railroad. However, in view of the strenuous argument made by the Company in this regard, we feel it might be well to call attention to some of the benefits received by the railroad.

A. General Principle to Be Used in Determining Benefits Received by Railroad.

First, there can be no question that, as a matter of equity, if the railroad is to be given the right of way over vehicular traffic at a point where the railroad crosses a public street, then all costs incident to making such cross-

ings safe should be assessed against the railroad. This being so, it necessarily follows that when the inconvenience to the public resulting from giving the railroads such right of way becomes so oppressive and hazardous to the public that a grade separation is necessary, the railroad should be required to pay the cost of such grade separation in excess of that which it would cost the City to improve the public street in the absence of the railroad. We recognize that the method of railroad operation is such that it would be [fol. 179-43] extremely costly and impractical, if not impossible, to require the Railroad to yield the right of way to vehicular traffic. That is the reason the railroads have received special consideration and have been accorded the right of way. However, as an incident of, and a condition upon which the railroads were accorded such special treatment the obligation to provide safe grade crossings and necessary grade separations was properly levied against the railroad. If the railroad would operate in the same manner as other traffic and comply with the laws of the road applicable to other traffic, this special burden would of course not be assessed against the railroads; there would be no necessity for such special treatment. But the special privileges enjoyed by the railroads, accorded to them so that they might operate in a preferred manner, entail certain obligations, of which this is one.

Therefore, the entire premise upon which Mr. Jenkins and other company witnesses attempt to determine the benefits accruing to a railroad from a grade separation is entirely false. *This is so as their computations and opinions have all been predicated upon the assumption that the railroad has the absolute and unconditional right to operate in total disregard of all other traffic, both vehicular and pedestrian.*

Mr. Jenkins, commencing at page 332 of the transcript (rehearing), was referring to the factor of delay. He stated that the "Johanson formula" showed that there was a material value that could be placed upon the delay to highway traffic. However, he admitted that that formula [fol. 179-44] did not go into the question of delay to rail traffic at all. With respect to whether or not the Railroad

obtained any benefit from the elimination of the delay hazard, he testified:

"A. I don't believe that in ordinary cases the delay factor, as it affects the railroads, is measurable. In most instances the railroad has established speed limits which are not as closely regulated by the volume of highway traffic as the delay to highway traffic is controlled by the volume of rail traffic. In other words, it is presumed that the protection afforded at the railroad crossing maintained by the railroad is sufficiently adequate to protect the highway traffic and the delay results to the highway traffic. There is very little delay, really, that can be attributed to the rail traffic with the exception of those instances where the rail lines may be in particularly populated cities or metropolitan areas where the general speed limit is slow.

Q. And the railroads are given priority over the vehicle traffic at grade crossing, by virtue of these protective devices? A. That is right.

Q. And don't you think there is some corresponding obligation to the railroad in cases where a grade separation becomes necessary because of the advantages they have been given that they should pay the cost of the grade separation? A. No, I don't subscribe to that theory.

Q. Isn't that grade separation comparable to the installation of these signalling devices? A. No.

Q. Why should the railroads be given priority over vehicle traffic, when, according to your own testimony, the rail traffic is decreasing, and the vehicle traffic is increasing? A. Well, there is a point of practicability involved. Highway traffic is continuous traffic. It consists of a continuous stream of traffic, [fol. 179-45] whereas, by contrast, the railroad operation is relatively infrequent and intermittent so that it wouldn't be practical to attempt to let the highway have free access and make the trains or the rail traffic wait for the highway traffic." (Tr. RH., p. 333, line 18, to p. 334, line 25.)

And when asked if in cases where there is synchronized control of traffic the railroads should be required to stop

at those synchronized signals, Mr. Jenkins answered: "No." (Tr. RH. 336.) When asked to explain the basis for his answer, he stated:

"A. I think it would be entirely impractical. A railroad couldn't operate under such conditions, a main line railroad.

Q. Why couldn't it operate under such conditions? A. Well, for several reasons. One of the principal reasons is that ordinarily a railroad train is of such length that it would obstruct more than one intersection, and if it were required to stop at each intersection in a thickly populated territory such as Los Angeles, that would mean that it would be obstructing two or three intersections at the time, and with the weight of a railroad train, to get under way with a normalized interval, signal interval, it couldn't time it within the time of the signal.

Q. So, the railroad constitutes a special type of hazard or nuisance, and should be required to provide facilities for its occupation—

Mr. Cummins: I object to the reference of the railroad as a nuisance.

Commissioner Huls: That portion refetring to nuisance may go out.

Mr. Arnebergh: It requires a special type of operation, does it not?

[fol. 179-46] The Witness: If you are saying that it is something special, it must be special with relation to something else.

Q. We were talking about traffic. A. Yes, surely.

Q. Therefore, that being true, should it not be required to provide the extra facilities necessary for that operation, rather than the public? A. No. You might look at it exactly from the reverse angle, that the highway traffic is a special type of traffic that needs special consideration.

Q. Can't highway traffic adjust itself to synchronized signals? A. Yes.

Q. Didn't you just say that a train couldn't? A.

No, it can't." (Tr. R.H. p. 336, line 7, to p. 337, line 16.)

He further testified that his opinion that the fault in regard to motor deaths and injuries at railway highway grade crossings lies primarily with the motorists and is largely completely out of the hands of the railroad was true only on the basis that the railroads have full right of way at grade crossings and are not subject to the ordinarily rules of right of way pertaining to other traffic at intersections. (Tr. RH. 405.)

Mr. Lee E. Sievert, Executive Representative of the President of the Santa Fe Railroad Company, admitted that if a main line train had to stop at a street crossing to let highway traffic go across there would be a detriment to the railroad. (Tr. RH. 402.)

Other instances can be cited to indicate that the entire evaluation of benefits which the railroad receives through the elimination of grade crossings are computed by the railroad on the fallacious assumption that the railroad is [fol. 179-47] given the right of way over vehicular traffic without incurring the corresponding liability to make grade crossings safe, and, when public convenience and necessity require, to provide necessary grade separations.

But the railroads have not been given the right of way over other traffic without having placed on themselves the obligation to provide necessary crossing protection, and to provide, at their sole expense, grade separations when required by the public convenience and necessity.

As was stated by the Supreme Court of the United States, speaking through Mr. Chief Justice Hughes, in *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671 at 674:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

Numerous other cases, holding that a railroad is obligated to pay the entire cost of a grade separation, could be cited. This has always been the law, and it is still the law.

The only time the railroad is not required to pay the full cost of a grade separation is where there is a statutory provision specifically providing otherwise. Such statutes indirectly provide further subsidies to the railroads and are, in effect, gifts of public funds to the railroads. In California the statute does not provide any specific amount which the railroads shall be relieved of paying, but instead leaves it to the discretion of the Public Utilities Commission. In our opinion, it would be an abuse of discretion for the Commission to apply the so-called benefits theory on the basis argued for by the railroads. To do so would [fol. 179-48] be totally unrealistic and would completely disregard the legal and equitable obligations of the railroad.

If the railroads are no longer willing to assume the burden necessarily imposed upon them as a concomitant part of the special privileges they enjoy, then let them also relinquish their special privileges.

B. Benefits From Longer Trains.

In connection with the benefits which the railroad receives from a grade separation, there are of course numerous other matters which should be mentioned.

In this connection, the testimony of Mr. Gray is important. For example, at pages 494 to 496 of the transcript (rehearing) reference was made to the fact that with diesel locomotives the railroad can handle longer trains and more tonnage per train. He was then asked:

> "What is the operating effect of that? Is it a savings to the company to simplify the operation and to have longer trains? A. The basis of successful operations on a railroad is the handling of traffic with one unit of power. In other words, ton miles is the basis of our cost figure, and that follows that the more tonnage you can handle in one train, the cheaper you can do it.
>
> Q. *And of course, the longer the train, the better for you?* A. *That is right.*
>
> Q. *Regardless of the fact that it might delay a crossing or block a crossing for a longer period of time?* A. *That might be true.*" (Tr. RH. p. 495, lines 2-13.)

Surely, with longer trains, which are a benefit to the railroad, the railroad receives a greater benefit from a grade separation. *But for the existence of grade separations at critical crossings the public would not endure the intolerable delays at these grade crossings which would result from these longer trains.* In fact, the public, in righteous indignation, would demand the elimination of all grade crossings at the expense of the railroads, if it were not for grade separations at major crossings.

C. Benefits From Use of Streets as "Feeder" for Railroad.

There are numerous other things to consider. First of all, it might be mentioned that the railroad itself materially benefits from use of the public streets as feeders for its railroad business. This is illustrated by the following testimony of Mr. Jenkins on cross-examination:

"Q. Speaking generally, now, as to the fact of rail passenger traffic, is it not true that probably 100 per cent of all passenger traffic handled by the railroads at some stage of their journey travel on city streets? A. Well, that's a pretty good estimate, I think, because they have to get to the depots.

Q. So that to that extent, the public streets are feeders and used as feeders for the railroad business, are they not? A. Yes, there is no doubt about it.

Q. And a comparable situation exists with respect to freight, isn't that true? A. That is largely so with the exception there is a larger percentage served directly by spurs by the railroads themselves that do not involve the truck connection." (Tr. RH, p. 414, line 25, to p. 415, line 18.)

Also, as shown at page 591 of the transcript (relating) and in Exhibit 62 RH, more vehicles use Washington Boulevard for the purpose of entering or leaving the Santa Fe Railway yard there for the purpose of entering or leaving any of the other properties immediately east of the underpasses.

[fol. 179-50] D. Benefits Accruing to Railroad From Elimination of Grade-crossing Accidents.

In connection with benefits received by the railroads

[illegible] grade separation, it is important to consider grade crossing accidents.

As was testified to by Mr. Frank H. Hitchcock, General Claim Agent of the Santa Fe Railway, in the four years 1947 to 1950 and the first six months of 1951, the Company had [illegible] grade crossing accidents in which [illegible] persons were killed and [illegible] injured. This is for Santa Fe operations alone. (Tr. RH. p. 468.)

While the Company claimed that the average grade crossing accident costs $750, this figure apparently only the actual claims payments made. It did not include the expenses that the Company was put to for investigation, for damage to railroad equipment, the delay to the train service, or any of such items. (Tr. RH. p. 470.)

As Mr. Hitchcock stated, in recent years the award to the railroad resulting from grade crossing has increased many fold, and a grade crossing is now a hazard to the railroad as well as to other traffic. (Tr. RH. 468.) Obviously, then, a railroad now receives many benefits than formerly from a grade separation.

He further testified that he knew that the damage to railroad equipment in connection with street crossing [illegible] was "very substantial." (Tr. RH. 468.) He also was asked: "Q. Do you frequently have serious damage to railway equipment?" (Tr. RH. 471.)

[illegible] Another witness, Mr. [illegible] Gray, General Manager of the Santa Fe, also testified with reference to this question. The following excerpt from his testimony is illustrative of his testimony:

Q. I am sorry, I am not familiar with your [illegible] operations, or your [illegible] operations. If [illegible] where there is a grade crossing, a train [illegible] crossing and hits an automobile, there is damage to the train, is there not, and damage to the automobile, and delay and disruption of your schedule, would there not, that would be added to your claim payments? A. There usually is. If you have to make repairs and train collisions, there invariably is some delay.

Q. If you happen to have an accident with a truck or something, then you have even a worse situation?

A. It might be, sir.

Q. And I suppose in some of the accidents you have had considerable damage done to your equipment? A. That is correct.

Q. Could you give us some illustration? A. Well, quite recently at Acton, a gasoline unit truck collided with our Super Chief, and practically destroyed one unit tractor as the building it is conveyed.

Q. About what was the damage to the railroad equipment in that case? A. Oh, I don't have those figures.

Q. Could you make an approximation? A. I would say it would run around $150,000.

Q. What was the delay experienced on your scheduling? A. Well, that particular train was delayed about two hours.

Q. Frequently, of course, if you had an accident—let me reframe that. If you had an accident at a [fol. 170-52] crossing such as this, where you had several tracks in quite a few scheduled movements, and you had considerable delay, it would interfere with many of your schedules, would it not? A. That is normally correct.

Q. And that has almost nationwide implications, does it not? A. Any serious delay would, of course, influence movements of traffic in either direction. Not only here, but further on down the line.

Q. Would you have any idea of the cost involved in an over-all re-scheduling and the delay resultant from an accident such as that? A. I haven't the least idea.

Q. It would be a tremendous figure, though, I suppose? A. Well, I wouldn't say that. It would involve, first, the extent of delay to the train that was concerned in the accident, and later with other trains that may be held up or detoured as a result of this particular accident. We would rather not take on too extensive delays. We would detour our traffic via other lines.

Q. Of course, that involves a considerable work, extra work, on your scheduling bureaus and so on?

A. Oh, yes. It requires some extra dispatching service, but we have organizations that are rather prompt about it.

Q. And other emergencies arise where you have grade crossings, of course? A. Yes, that is true to some extent, but I wouldn't say that it is nearly as serious, normally, that a collision is nearly as serious as a derailment of even one car.

Q. Isn't it frequent, I know I see in the papers frequent pictures where even the last time a little old 1926 Ford derailed a few freight cars? A. That occurs, but not frequently. Sometimes an automobile [fol. 179-53] will roll up under the diesel engine and steam engine and take some time to dislodge it.

Q. By 'some time,' do you have any— A. Sometimes you have to cut them out with welding torches or something of that sort. It may require up to two hours to get them out of there.

Q. When you have a derailment, what does it result in, for example, if you have a few cars derailed? A. Well, the first thing you would have to do is to call your wrecker and get the crane. That requires some little time to reach the derailment, depending on how far away the accident may be, and then the time that you would continue in re-railing the cars and straightening out your track and repairing it." (Tr. RII. p. 402, line 14, to p. 406, line 12.)

Further, as shown at page 189 of the transcript (rehearing), even in connection with accidents that do not cause any particular damage to railroad equipment there is a delay to the train in cases where people are injured or killed.

It will therefore be seen that, from the safety standpoint, a grade separation is a great benefit to the railroad, a benefit growing greater every day.

E. Benefit From Improved "Good-Will."

Another factor, although intangible, is "good-will." Certainly a railroad loses goodwill by these grade crossings. And I am not here referring to those poor unfortunates who are mangled and maimed by the trains, nor to the widows and orphans of the victims slaughtered at grade

crossing accidents. Neither am I referring only to the passengers who are on the trains delayed by the accident, nor to the relatives and friends of such passengers who [fol. 170-54] patiently (or impatiently) wait at the station to meet the arriving passengers, only to see the time of arrival of the train repeatedly changed to a later hour. Primarily I am referring to the motorist, who potentially is a patron of the railroad, either as a passenger or shipper, who, while delayed at a grade crossing, swears to never again patronize that railroad.

F. Benefit From New Structures.

Directing our attention specifically to the facts of this case, we find special circumstances of great importance. The bridges here involved are now some 38 years old. The Santa Fe depreciates bridges of this type on a 50-year life basis. (Tr. RH. p. 522.) The bridges are therefore more than 75 per cent depreciated.

Further, the construction of the bridges is now substandard. The Cooper loadings for one of the existing underpasses is E-36 and the other is E-60. (Tr. RH. p. 522.) However, as shown by Exhibit 61 RH, and at pages 580 to 582 of the transcript (rehearing), present A.R.E.A. officially recommended specifications have gradually increased and the present standard adopted in 1943 recommends a Cooper loading of E-72. It will therefore be seen that not only are the existing railroad structures old and approximately three-fourths depreciated, but they are now substandard and do not conform to the A.R.E.A. specifications for railway bridge liveloading specifications and standards. This of course becomes increasingly important in view of the testimony of various company witnesses to the effect that the railroads are now using longer trains with heavier loads. Obviously, the heavier loads require stronger bridges.

[fol. 170-55] Certainly the railroad will benefit from acquiring new, modern, stronger structures in lieu of old, obsolete, substandard structures 75 per cent depreciated!

Conclusion.

Throughout these entire proceedings the City of Los Angeles has maintained the position that the proper basis

of allocating expenses of a grade separation involving a city street is to require the City to pay the amount it would cost the City to improve the city street, in the manner proposed, if there were no railroad tracks; and to require the railway to pay the additional cost resulting from and necessitated by the presence of railroad tracks. As has been stated:

"* * * The true basis of apportionment of the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement."

State of Missouri ex rel. Wabash R. Co. v. Public Service Comm., 100 S. W. 2d 522, 109 A. L. R. 754.

See, also:

State ex. rel. Kansas City Terminal R. Co. v. Public Service Comm. 272 S. W. 957.

The formula advocated by the City of Los Angeles can be applied with mathematical exactness in every case, and, in our opinion, gives full and proper consideration to both the legal and equitable principles applicable to grade separations. Further, this formula has been approved by a resolution adopted by the League of California Cities. [fols. 130-56-137] We strongly urged our viewpoint to the Commission; nevertheless the Commission allocated to the City the amount of $529,037.50, as compared with the amount of $111,750 which would have been allocated to the City under the formula which we believe to be most equitable. Had the Commission adopted our formula it would have allocated to the petitioner the sum of $701,015, instead of $284,577.50, as was done by Decision No. 47344.

However, we recognize that under the law the Public Utilities Commission has the exclusive power to allocate costs of grade separations. When, as here, the Commission, after a full and fair hearing, and based on adequate evidence and findings, and in the exercise of a sound discretion, makes an order allocating costs, then the order of the Commission is a final determination of the matter.

We therefore respectfully submit that the Petition for Writ of Review should be denied.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Roger Arnebergh, Assistant City Attorney, Attorneys for the City of Los Angeles, a Respondent and Real Party in Interest.

[fol. 188]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title omitted)

REPLY TO ANSWER OF THE RESPONDENT PUBLIC UTILITIES COMMISSION AND TO ANSWER AND BRIEF OF THE RESPONDENT CITY OF LOS ANGELES—Filed November 12, 1952.

(File endorsement omitted)

PRELIMINARY STATEMENT.

Petitioner herein seeks a Writ of Review for the purpose of obtaining a judicial determination of the lawfulness and constitutionality of Decision No. 47344 of the Public Utilities Commission (51 Cal. P. U. C. 771) which requires the Santa Fe Railway to pay half of the costs of reconstructing and enlarging two existing railroad bridges over Washington Boulevard in the City of Los Angeles.

The jurisdiction of the Supreme Court of California is invoked under the Public Utilities Code, Sections 1756-1760, under which the Supreme Court, and only the Su-

[fol. 189] preme Court, is authorized to review decisions of the Public Utilities Commission.

So. Calif. Edison Co. v. Railroad Commission (1936), 6 Cal. 2d 737, 59 P. 2d 808;

American Toll Bridge Co. v. Railroad Commission (1938), 12 Cal. 2d 184, 83 P. 2d 1.

The Commission has filed its answer to the Petition for a Writ of Review, hereinafter sometimes referred to as "P. U. C. Br." and the City of Los Angeles has filed its Answer and Brief in opposition to the Petition for Writ

of Review, hereinafter sometimes referred to as "City's Br."

The questions presented here involve the over-all problem of the allocation of costs in grade separations. The Commission considers the basic principles enunciated in its decision here (51 Cal. P. U. C. 771) as controlling since the decision of the Commission in this matter was subsequently followed and used as a basis of decision in the later "*Los Feliz*" case (51 P. U. C. 788). This latter case involved a typical grade separation where it is proposed to eliminate a grade crossing by constructing an underpass. The Court is urged to consider fully the matters presented here because the Commission has treated this matter as far reaching (51 Cal. P. U. C. 788) and beyond the particular facts presented in the record. The other railroads have recognized the importance of this matter by filing an extended Brief. Further the "*Los Feliz*" case is now before the Court in *Southern Pacific Company v. Pub. Util. Comm.*, S. F. No. 18704.

[fol. 190] I.

Petitioner Requests That This Court Exercise an Independent Judgment Upon the Law and Facts.

The Commission asserts that the railroad is asking for a trial *de novo* before the Supreme Court on all of the issues presented by this petition for a Writ of Review (P. U. C. Br. p. 12). Such is not the case. Petitioner does not ask the Supreme Court to look beyond the record made before the Commission (Pet. pp. 10, 53-57) except insofar as the Court may take judicial notice of changed circumstances today as compared with the earlier cases, with respect to increases in highway travel and changes in the types, size and volume of vehicles using the highways and related matters. The question of scope of review is discussed fully at pages 4 to 13 of the brief heretofore filed on behalf of the Southern Pacific Company and Union Pacific Railroad Company, as interested parties, and The Western Pacific Railroad Company and Pacific Electric Railway Company as *amici curiae*, hereinafter referred to as "other railroads," in support of the

instant Petition for a Writ of Review. Rather than expand this brief unduly, Santa Fe refers to the brief filed by the other railroads on this point as setting forth the correct rule of law upon the subject.

Petitioner would like to add, however, that it agrees with the Commission that the Commission in rendering its decision and order exercised a legislative function (P. U. C. Br. p. 29). Therefore, unless the Supreme Court grants the Writ requested, Petitioner will have no actual judicial review whatever.

[fol. 191] The order issued by the Commission is a complete reversal of the benefit principle of allocation of costs followed by the Commission since 1933 (see the *Goshen Junction* case, 38 C. R. C. 380) and it is a decision which departs completely from the Commission's stated position respecting *these exact same underpasses in 1932* (*Washington Boulevard* case, 37 C. R. C. 784), when the Commission held that since the vehicular public will receive the greatest benefit from widening these separations, it logically follows that the public should bear the greater portion of the cost. (See Section IV, pages 57 to 89 of the Brief filed by the other railroads for an extended discussion of this matter.)

Petitioner seeks a *judicial review* of a federal constitutional question. Petitioner does not ask to bring in new evidence, but does ask that the Court examine the evidence (Pet. p. 10) and exercise its *independent judgment* as to both the law and the facts as provided by Sections 1757 and 1760 of the Public Utilities Code. Petitioner respectfully points out that nothing is said in Section 1760 or any other to the effect that in exercising *independent* judgment the Court must first overcome a presumption (as urged by the Commission) that the Commission's findings are constitutional.

Unless this petition is granted the railroad is faced with a final order of an administrative body acting as a combination legislature, judge, jury and reviewing tribunal. The Commission says that its order is tantamount to a statute; that it cannot be set aside unless the Court can say that it was impossible for a fair-minded board to come to the result that was reached (P. U. C. Br. p. 33);

or a least that "any substantial evidence" is sufficient to justify the order (P. U. C. Br. p. 38); and, finally, that the [fol. 192] Court may not "substitute its judgment" for that of the Commission (P. U. C. Br. p. 32).

Petitioner's position is that the Commission ignored the evidence, made findings contrary to the evidence, substituted its arbitrary "discretion" in the matter without the support of substantial evidence, and reversed its own rules and standards, of twenty years' standing, for reasonably applying the police power in cases of this type. Instead of reappraising the liability of the parties the Commission reverted to rules and standards established almost forty years ago.

This Court has held in *Southern Pac. Co. v. Railroad Comm.* (1929), 13 Cal. 2d 125, 87 P. 2d 1052 at page 130, that the Commission must not decide the issues upon the basis of its own concepts and must not disregard the evidence.

The legislature itself has stated just how much finality the Commission's orders shall have and thus by statute (P. U. C. Sec. 1760) prevented the Commission from exercising unbridled power based upon the arbitrary "discretion" of its members, by specifically providing for *independent judicial* review of a federal constitutional question.

The Commission states that Section 22 of Article XII of the California Constitution permits the legislature to delegate powers to the Commission without any restraint by the State Constitution (P. U. C. Br. p. 33). But the point is, the legislature did not delegate to the Commission all the power of the State but reserved to the Supreme Court an *independent judgment* in a case, such as this, involving a federal constitutional question.

[fol. 193] The case of *Alabama Public Service Comm. v. Southern R. R. Co.* (1951), 341 U. S. 341, 95 L. Ed. 1004, relied upon so strongly by the Commission, lends no support to the Commission at all since Alabama did provide for an independent judgment as to both the law and facts by both the county court and by the State Supreme Court.

With the above background of the law in mind we respectfully point out on the record made before the Commission there is no basis in the evidence for the finding

of the Commission that Washington Boulevard must be widened at the location of the underpasses to meet *local transportation needs*. This is a half truth and is therefore untrue. The abstract of evidence contained in Petitioner's memorandum (pp. 18-44) and the Brief of the other Railroads hereinabove referred to (at pp. 14-24), set forth the evidence describing the nature and use of Washington Boulevard. The evidence is overwhelming and uncontradicted that Washington Boulevard has since 1931 been fostered by the City as an arterial major highway and that more of the large cross country trucks which are competitive with the Santa Fe use it than any other east-west street *or highway* in the City of Los Angeles (R. 110-113, 115, 140-141, 144, 145). The commercial and competitive character of Washington Boulevard has been totally ignored by the Commission, even though Petitioner presented a special study upon the subject (Ex. 29 R. H.) and introduced into evidence a traffic count showing that one-fourth of the traffic through the underpasses consists [fol. 194] of large trucks, many of them bearing Interstate Commerce Commission licenses (Exs. 39, 40 and 41 R. H.; R. 498-499).

Much of Petitioner's evidence was introduced to show the Commission the extent to which trucks and automobiles using publicly financed highways have taken away railroad business so that the railroads have long since ceased to expand in proportion to the increases in population (R. 213, 411); that magnificent new six lane highways like Washington Boulevard are built principally for the purpose of expediting an ever-increasing flow of motor vehicles (Ch. 4, Ex. 29 R. H.); nevertheless, the Commission sought to justify its decision upon the finding that "material changes" have taken place in conditions at the present time, as compared to those in 1932, enumerating (1) the great increase in population and (2) the tremendous increase in motor vehicle traffic. In 1932 these same "material changes"—the vehicular public will get the greater benefit—were given by the Commission as justification for requiring a smaller payment from the railroad, viz., 25% (37 C. R. C. 784, 787). The *non sequitur* in the Commission's reasoning is glaringly apparent: Even more

of the same identical "material changes" justifying a smaller payment in 1932 are now made to justify a payment of 50% of the cost! Petitioner's need for having an unbiased Court judge the evidence independently is more pronounced where the changing personnel of the administrative tribunal desert not only the evidence in the case but logic as well.

[fol. 195]

II.

The Commission's Order Is an Arbitrary, Unreasonable and Unconstitutional Exercise of the Police Power.

A. Nature of the Police Power.

In their answers and briefs the Respondents' Public Utilities Commission and City of Los Angeles have sought to justify the order of the Commission apportioning half of the costs of enlarging the railroad bridges over Washington Boulevard to the Santa Fe as a valid exercise of police power, and as *damnum absque injuria*. At page 59 of its opening memorandum of Points and Authorities, Petitioner sought to show briefly the limitations imposed upon the police power. Since Petitioner believes that the fundamental and primary question before the Court is whether or not the Commission's order is a *reasonable* exercise of the *police power* (*Nashville, etc. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949), it is essential to inquire searchingly into the basic characteristics of police power and the constitutional limitations thereon. There are set forth below the essential characteristics of the police power involved in this matter.

1. Petitioner is a railroad corporation carrying on its business in California and claims the protection of the Fourteenth Amendment of the United States Constitution and Article I, Sections 13 and 14, of the California Constitution against the application of state authority, delegated to the Public Utilities Commission, the same as an individual claims that protection. A title to land in fee [fol. 196] simple or an easement in land owned by the railroad is a property right protected by both Constitutions.

Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77, 82 L. Ed. 673, reversing 67 P. 2d 675, 8 Cal. 2d 624 (1937);

Los Angeles Railway Corporation v. Railroad Commission of California, 29 F. 2d 140, aff'd, 280 U. S. 145, 74 L. Ed. 234;

Merced Dredging Co. v. Merced County, 67 Fed. Supp. 598.

2. The due process clause of the Fourteenth Amendment requires that State action shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation *to the object sought to be attained.*

Merced Dredging Co. v. Merced County, supra, p. 606.

3. The police power of the State may not be invoked to satisfy a mere public wish or desire, or demands founded upon aesthetic or sentimental considerations, but only to protect essential public interests.

Merced Dredging Co. v. Merced County, supra, p. 607.

4. The police power may be invoked in derogation of property rights only when founded upon valid and substantial considerations relative to the health, the morals, or the safety of the public. In *Hart v. City of Beverly* [fol. 197] *Hills* (1938), 11 Cal. 2d 343, 345, the Supreme Court stated:

> "By judical determination, evidenced by many legal precedents, the principle of law is thoroughly established, that the constitutional rights of the individual to acquire and to possess property includes the right to dispose of it . . . excepting only in that regard, that the exercise of the police power may be invoked in derogation thereof when it is founded upon valid and substantial considerations relative to the health, the morals, the safety or the 'general welfare' of the public."

At page 346 the Court states:

> "Covering a period of decades, the exercise of the police power was limited to conditions wherein either

the health, the morals, or the safety of the general public was seriously and unquestionably involved. As long as any or either of such requirements were or was respectively maintained, personal liberties were not seriously endangered—but not so, necessarily, upon the advent of the addition of the element of 'general welfare' to those constituents which theretofore solely had constituted a justifiable excuse of warranty for the destruction of natural rights. It is obvious that in its liberal and untrammeled construction, 'general welfare' has an infinite range—nearly, if not as completely beyond the contemplation of the human mind as is the universe itself. * * *

"Thus, if the meaning of the words 'general welfare' be accorded their utmost significance, the original 'due process' protector of human rights may be so endangered by the attacks made thereon by the 'police power' destroyer that considering present legis-
[fol. 198] lative tendencies, within the lives of those now in being, if utter annihilation of the substance of constitutional guaranties do not ensue, no more than a shadow ultimately may remain. * * * But such results may ensue only in the absence of conservative and conscientious judicial construction and interpretation of legislative acts. As hereinbefore has been indicated, it should be noted that the words 'general welfare' have been grafted upon the original stock of 'health, morals and safety,' with the resulting incident that they must be interpreted in accord with the rule that requires that when words of a general character follow those of special meaning the former must be governed in their significance by that which inheres in the latter. Otherwise stated, in the construction of a statute, special words employed wherein are the guiding, if not the controlling force as regards general and succeeding words (citing authorities). With such reversion to legal principles of statutory construction, their application to the instant situation must result in the conclusion that the inclusion of the words 'general welfare' as an element either essential, or which may be relied upon as affording a justification for that

which otherwise properly might be termed a violation of the personal rights of the individual, had the effect only of enlarging or expanding the significance that formerly was deemed properly attachable to the grounds originally deemed necessary to the expedient exercise of the police power of the State."

The opinion requires, therefore, that any legislative act in this state in order to be valid in the face of a challenge on constitutional grounds must bear a reasonable relation to *public health, safety* or *morals*.

[fol. 190] 5. In *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District* (1914), 233 U. S. 75, 58 L. Ed. 857, the Court held that direct interference with and regulation of a subject matter committed by the Constitution to the exclusive control of Congress could not be avoided by the State,

"by simply invoking *the convenient apologetics of the police power*. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' (Citing cases) . . . Furthermore *in the present case it is not pretended that local welfare needs the removal of the defendants' bridges* at the expense of the dominant requirements of commerce with other states, *but merely that it would be helped by raising them*. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass."

As expressed by Justice Brandeis in *Nashville C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949, 955:

"A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitu-

thereof limitation that it may not be exercised arbitrarily or unreasonably."

[fol. 200] At page 303 the Court further stated:

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. *Missouri Pacific Ry. v. Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. v. Nebraska*, 217 U. S. 196; *Great Northern Ry. v. Minnesota*, 238 U. S. 340; *Great Northern Ry. v. Cahill*, 253 U. S. 71. These were the authorities relied upon by this Court in *Chicago, St. P., M. & O. Ry. co. Holmberg*, 262 U. S. 162, 167, where it held that *to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.*

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. *Chicago, B. & Q. R. Co. v. Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, 592. And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But *when particular individuals are singled out to bear the cost of advancing the public convenience*, THAT IMPOSITION MUST BEAR SOME REASONABLE RELATION TO THE EVILS TO BE REMEDIATED OR THE ADVANTAGES TO BE SECURED. Compare *Hadacheck v. Los Angeles*, 239 U. S. 394; *Miller v. Schoene*, 276 U. S. 272. While moneys raised by general taxation may constitutionally be applied to put-

[fol. 201] poses from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southwestern Ry. v. Nattin*, 277 U. S. 157; 159; *Memphis & Charleston Ry. v. Pace*, 282 U. S. 241, 246; so-called *assessments for public*

improvements built upon particular property owners are ordinarily constitutional only if based on benefits received by them."

6. In *Hooker v. L. A. County Flood Control Dist.* (1944), 25 Cal. 2d 384, 153 P. 2d 950, plaintiff set forth that defendant had removed soils and secure protection adjacent to her land and substituted therefore an unsafe bank resulting in the inundation of her property. Reversing the judgment of dismissal after the lower court sustained a demurrer to the complaint, this Court had the following to say regarding police power (at p. 388):

"Accepting the premise of argument of the parties here that a levee improvement made in the channel of a stream for the general welfare is referable to the police power, the propriety of its exercise must still be considered under the distinct circumstances presented. While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation."

This Court then quoted from *Archer v. City of Los Angeles* (1941), 19 Cal. 2d 19, 119 P. 2d 1 (heretofore [fol. 202] cited and quoted at p. 59 of Petitioner's Memorandum), as follows (p. 388):

"'The state or its subdivisions may take or damage private property without compensation if such action is *essential* to safeguard public health, safety or morals. (Citing authorities.) *In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner.* (Citing authorities.) * * *' (Italics added.)"

Continuing at page 320 of the Hoover case, the Court states:

"Even there is recognized the inconvertible proposition that the exercise of the police power, though a lawful attribute of sovereignty for the public welfare and safety is by nature, subject, beyond any question of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property."

Justice Carter's observations in his dissent in *Archer v. City of Los Angeles*, 19 Cal. 2d 19, 28, although involving the flooding of privately owned lands by the Los Angeles Flood Control District, are just as pertinent here:

"The true basis of liability in cases of this character is found in the constitutional provision prohibiting the taking or damaging of private property for a public use without the payment of just compensation. (California [Feb. 1935] Constitution, art. I, sec. 14.) The liability exists independent of negligence on the part of the public agency." (P. 28.)

"Manifestly, the correct test of whether or not the police power has been properly exercised is not and never has been the degree of public necessity. To be appropriate it must be for the public health, safety, morals, or general welfare. If the degree of public necessity be the test then the constitutional guarantee of just compensation for property taken for a public use is completely and forever abrogated. If a legislative body finds that public necessity requires the taking of property for highways, for streets, for a water supply, for recreational areas, for hospitals, for schools or other public buildings, or for a myriad of other public purposes, the courts must accept such a finding as conclusive. If such a finding is all that is necessary to warrant the exercise of the police power, there will be no occasion for the state or other public agency ever paying for any private property taken or damages for a public improvement. Who may say that property for schools, highways, streets, etc., is not absolutely necessary for the proper functioning

of the government? Indeed, it is an indispensable factor in the exercise of the power of eminent domain where compensation is payable, that the public convenience and necessity demand the taking or damaging of any private property involved in the public improvement contemplated. Thus, under the theory advanced in the majority opinion, in any case that the power of eminent domain may be properly exercised, the police power could also be invoked with the result that no compensation would be recovered. Although it is difficult to observe the dividing line between the exercise [fol. 204] of the two powers, it may be justifiably said that police power operates in the field of regulation, except possibly in some cases of public emergency such as a fire where buildings may be destroyed, rather than in the taking or damaging of property for some public improvement. A man may be prevented under the police power from so using or maintaining his property that it is detrimental to the public health, safety, morals or general welfare. Regulations may be invoked to prohibit such use and maintenance. But where neither his property nor its use or maintenance by him has any relation to the public good sought to be accomplished or evil to be remedied, other than that the public desires to use his property, he should be compensated for the taking or damaging of it if the constitutional guarantee still exists." (Pp. 54, 55.)

"I cannot refrain from adverting to the recent but growing tendency of some courts and judges toward the destruction of constitutional guarantees by the process of specious interpretation. It may be that such constitutional guarantees are obnoxious to the social or economic philosophy of the judge or judges deciding the particular cause; but I submit that it is for the people and not the courts to bring about changes in our Constitution. To invoke the police power as a justification for the taking or damaging of private property for public use in violation of section 14 of article I of the Constitution of California is nothing less than amending the Constitution by judicial edict or nullification by sanction of law." (P. 59.)

The *Archer* case was followed in the holding of the California Supreme Court in *Rose v. State of California*, 19 Cal. 2d 713, 123 P. 2d 505. There plaintiff sued to [fol. 205] recover compensation for damages caused through loss of his means of ingress and egress by the construction of a subway or underpass in the center of the street. Defendant contended that the damage, if any, occurred as a result of the exercise of the police power and was therefore damnum absque injuria. In response to defendant's contention, the Court said:

"This contention is wholly without merit as there is no basis for the application of the police power doctrine to the factual situation in this case.

"Generally, it may be said that police power operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality. There is obviously no element of regulation involved in the case at bar, and no suggestion of anything in the nature of an emergency. The damage to plaintiffs' property here involved was the result of a public improvement constructed by the state in the exercise of its power of eminent domain.

"While it is true that the seeming absolute protection against the taking or damaging of private property for public use provided for in section 14 of article I of our Constitution may be qualified by the police power in the area in which such power operates, it should be obvious that the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists. To hold otherwise would in effect destroy the protection guaranteed by our [fol. 206] Constitution against the taking or damaging of private property for a public use without compensation. (*Gray v. Reclamation Dist. No. 1500*, 174 Cal. 632 (163 Pac. 1024); *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 260 U. S. 393 (43 S. Ct. 158, 67 L. Ed. 322).)"

2. The next matter to be considered is that no exercise of the police power of the state is constitutional unless it meets the test of reasonableness:

"The power to regulate the use of property or the conduct of a business is, of course, not arbitrary. The restriction must bear a reasonable relation to some legitimate purpose within the purview of the police power."

Ex parte Rodenbeck (1913), 165 Cal. 416, 421, 132 Pac. 554.

On reasonableness as a test, the text writers all agree, e. g., Corpus Juris Secundum, Constitutional Law, Section 195, page 668:

"The police power is subject to the limitation that its exercise must be reasonable and for the public good, . . . the test of the validity of an exercise of the police power is whether it is reasonable."

Corpus Juris Secundum, Constitutional Law, Section 571, page 1163, states:

"The guaranties of due process does not prevent the exercise of the police power, provided such exercise is reasonable and the means selected have a real substantial relation to the object sought to be attained."

[fol. 207] Under this heading, just quoted, the text states (p. 1160):

"Hence, while the guaranty does not interfere with the proper exercise of the police power, and does not prohibit governmental regulation for the public welfare, it of necessity gives way to reasonable police regulations protecting life and property, the due process clause does condition the exercise of the admitted power, by securing that the end shall be accomplished by methods consistent with due process, which demands that it be for a public purpose, that it be not unreasonable, arbitrary, or capricious, which demands only that the law shall not be unreasonable, arbitrary, or capricious, or that the law shall not be unduly op-

promotion, and that the means selected shall have a real substantial relation to the object sought to be attained."

See also:

Nebbia etc. v. Walters (1935), 294 U. S. 405, 79 L. Ed. 940.

3. Most important of all, any reasonable application of the police power is to be tested in the light of present day conditions. In *Wholesale Tobacco Dealers Bu. v. National Candy & T. Co.* (1938), 11 Cal. 2d. 634, 644, 82 P. 2d 3, the Court says:

"The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to [fol. 208] regulation in order that the general welfare may be adequately protected. The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions. These principles have frequently been enunciated by this court and by the Supreme Court of the United States." (Emphasis supplied.)

The bases for Petitioner's charge that the Commission's order is unconstitutional are restated for clarification. Petitioner's property is summarily taken without compensation in the form of benefits received by the proposed construction thus reducing the Santa Fe to the status of a second class citizen in so far as its property rights are concerned. The subject matter within the province of the police power —public health, morals, safety and welfare—has no substantial relation to the "object sought to be attained" which in this proceeding concerns primarily the expediting of vehicular traffic. The imposition of half the costs does not bear a reasonable relation to "the evils to be eradicated or the advantages to be secured." The correct test of whether or not the police power has been properly exercised

is not and never has been the degree of public necessity, much less mere convenience. No emergency exists to justify the taking of property without compensation or in lieu thereof benefits that accrue to Petitioner. Finally, the Commission's purported exercise of the police power is in fact a reversion and retrogression to conditions existing long ago, based upon outmoded precedents and ignores present day conditions and is therefore unreasonable.

[fol. 209] B. The Commission's and the City's Attempts to Justify the Order as Reasonable, Are Based Upon Precedents of a Bygone Era—Not Upon Present Day Conditions.

The Commission's attempt to justify the imposition of costs for enlarging the existing railroad bridges over Washington Boulevard—as reflected by the Commission's orders—depends upon which of three separate orders respecting these same bridges are referred to:

Thus in 1932 the same Commission, but consisting of different personnel, concluded (37 C. R. C. 784) that the Petitioner Santa Fe, should pay 25% of the cost (or one-half as much percentage-wise as the current order) of enlarging the very same structures here under consideration. In the Matter of the Application of the City of Los Angeles for the Widening of the two Existing Grade Separations . . . In connection With the Improvement of Washington Boulevard (37 C. R. C. 785) the Commission in its opinion stated:

> "Washington St., a new major traffic artery extends in a general westerly direction through the city of Los Angeles and merges with Twenty-third Street through the separations involved herein. The present westerly terminus of Washington Street connects with Roosevelt Highway in Santa Monica and the easterly terminus is at Alameda Street, located approximately 4200 feet west of the said grade separations. The city of Los Angeles now proposes to extend Washington Street easterly to connect with Telegraph Road, which is also a major traffic artery . . . The record shows that approximately 30,000 vehicles daily will use Washington Street through the grade separations within a reasonable time after the extension is completed."

[fol. 210] The Commission went on to state that since the recently constructed bridge over the Los Angeles River was 700 feet east of the underpass and was only 56 feet wide that the railroad company should not be required to share in the cost of railroad bridges over Washington Boulevard in excess of 56 feet. Finally the Commission found:

> "There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost." (P. 787.)

Since there are more vehicles and more traffic congestion now than in 1932, this finding by the Commission is even more pertinent now.

To be noted is the fact that the 1932 opinion in no way discloses what costs were taken into account by the Commission, and whether such costs as drainage ditches and retaining walls were included cannot be determined without going outside of the present record and evidence. The fact remains, although the City's Brief suggests the contrary (p. 3) that 25% of the costs was charged to the Santa Fe in 1932 (37 C. R. C. 784) and 50% in 1952 (51 Cal. P. U. C. 771).

The Petitioner argued then, as is argued now, that the Petitioner will receive no benefit from widening the grade separation structures; that such construction will increase the Petitioner's maintenance costs while the vehicular public will derive the entire benefit. The Commission answered by stating that, "due consideration should be given to the obligations of each party, as well as the benefits [fol. 211] derived" (p. 787). The Commission concluded in 1932 that, "it appears reasonable for The Atchison, Topeka and Santa Fe Railroad Company to bear one-fourth of the cost of constructing said separations."

The second opinion and order issued in 1949 (Appendix F of the Commission's Answer, 49 Cal. P. U. C. 147), doubled the percentage of the cost allocated to the Santa Fe, from 25% to 50% and increased the actual amount Santa Fe would have to pay from $58,466.32 (in 1932)

to $95,160.00 (in 1949). Petitioner fears that the 50% formula adopted in the decision perpetuated on rehearing, could cost the railroads in California scores of millions of dollars during the next few years.

The only justification to be found in the 1949 opinion for such increase is the following:

> "As pointed out by applicant in its closing brief, we cannot now fail to take note of the material change in conditions at the present time as compared to those in 1932, at the time of Decision No. 25069, *supra*. The great increase in population and the tremendous increase in motor vehicle traffic present a new problem.
>
> "According to the evidence presented, the widening of the underpass is now necessitated by the increase in vehicular and pedestrian traffic."

The 1949 opinion also pointed out that the vicinity of the underpasses has become one of the leading industrial sections; that there is a large amount of truck traffic; and that the height of the existing bridges is insufficient for tall commercial vehicles.

Then the Commission stated forthrightly that:

> "We must take cognizance of present-day conditions, and in this particular instance we are impressed [fol. 212] not only by the fact that the need for the proposed improvements is not brought about by any requirement of the railroad, but also by the fact that, but for the existence of the railroad, at the location of the proposed street widening and the grade separation structures now there, the city would be able to widen its street without the necessity of incurring the cost of replacing the existing bridge and underpass structures with the new structures proposed."

The Commission approved language in another case to the effect that direct financial benefits is not the sole test to be used in determining how much the railroad should pay, but due consideration should be given to the obligations of each party as well as benefits received—"We believe that the railroad has a continuing obligation to participate in the cost . . ."

Although in 1949 the same size bridge was authorized for the "public convenience and necessity" as was authorized in 1932, the Commission's opinion does not tell us how or why the Santa Fe's "obligation" or benefit was doubled nor does it justify the doubling of the percentage of costs assessed against the Santa Fe.

The third decision (51 Cal. P. U. C. 771), dated June 24, 1952, to which Santa Fe's Petition for a Writ of Review is addressed, increased the share to be paid by Santa Fe to 50% of $569,355.00 or $284,677.50. Gone was the allowance made in the 1949 order excusing the Santa Fe from participating in the cost of 20 feet of the new structures replacing the 20 foot long existing structures, and gone was the requirement that the City alone pay the expense of bridges wider than 56 feet.

[fol. 213] Disregarding recitals of evidence, the Commission in 1952 found:

1. That there is a need for widening and increasing the heights of the existing underpasses.

2. That the divided span bridges consisting of space for two 33 foot roadways and two 7 foot sidewalks would best meet the public safety, convenience and necessity.

3. That the Commission has authority pursuant to Public Utilities Code, Section 1202, to allocate costs.

4. That its authority is an exercise of the police power.

5. That under the exercise of the police power the Commission may require grade separations and may apportion costs "in the exercise of its sound discretion" (p. 781).

6. That material changes have taken place in conditions at the present time as compared to those in 1932—the great increase in population and the tremendous increase in motor vehicle traffic present a new problem.

7. That the proposed widening of Washington Boulevard is to meet local transportation needs.

8. That the City's contribution must come entirely from local funds.

9. That the improvement is "not without benefits to the railroad" because it can operate longer trains without delays and without hazard of grade crossing accidents and the new structures would replace bridges that are 75% depreciated.

[fol. 214] 10. That it is in the public interest to authorize the widening and increasing of the height of the existing underpasses.

11. That the Santa Fe shall pay 50% of $569,255.00.

There is no attempt made in the answers and briefs of the Commission and of the City to justify the decision on the basis of reasonability or equity and any attempt to do so would be transparent under the circumstances.

The Commission's argument is founded instead upon authorities which are for the most part of World War I vintage and the era of the Model T. The Commission asserts that it is not bound by any statutory requirement but may assess costs in its "discretion"; thus that there is no guide but the good faith and personal convictions of changing personnel of the individual commissioners who in 1962 decided that Petitioner should pay twice as much percentagewise and four times as much in dollars as was required twenty years ago when the same Commission but different personnel, exercising the same police power, decided exactly the same issues differently.

The Commission attempts to distinguish the only pronouncement of the United States Supreme Court on the cost apportionment problem issued in the past 17 years (*Nashville C. and St. L. Ry. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949), and they must attempt to distinguish it because this latest decision takes account of the changed conditions resulting from the tremendous increase in volume and importance of highways and vehicle traffic and strikes down as arbitrary legislation placing on the railroad half the cost of a grade separation.

[fol. 215] The Commission does argue that it now presents to the Supreme Court a *fait accompli* and says that it must be accepted.

One looks in vain through the pages of the Commission's brief for any attempt to justify the decision on any basis of reasonableness under the factual conditions of need for the improvement or benefit to be received by the parties in interest today. Repeated by the Commission is the charge that Santa Fe "rebels," "revolts" or would "overthrow" the regulatory statutes (P. U. C. Br. pp.

35 and 37). Petitioner reaffirms its stated position that the railroads and highways must co-exist in today's world and that it does not rebel nor is it repelled by the thought of paying a reasonable sum based upon the benefits to be achieved by enlarging the existing bridges. Petitioner believes that a reasonable sum can only be judged by the benefit basis of assessing costs and that the benefit basis is synonymous with reason and equity under present day conditions. Petitioner does object to paying a large percentage of the costs of an ambitious and expensive project having a minimal relation to safety and a maximal relation to public convenience (avoidance of delay).

The City's Argument.

The City presents much the same matters as the Public Utilities Commission. Points IV and V of the City's Brief (pp. 35 and 47) touches upon the equities in the situation. Point IV excuses the view that there is no logical basis for the benefit method of assessing costs, but here again the reliance is upon cases at least 15 years old which in turn rely upon decisions published 35 years ago and which, even Petitioner believes did substantial justice under the circumstances existing in that day. The [fol. 216] City stoutly asserts that the railroad's obligation is much greater *per se* because city streets are involved (p. 46), and also when local transportation needs are involved and the City must spend its own money for the improvements (p. 42).

But here the so-called city street is a major arterial highway rendered to act as a feeder to freeways and to decrease the traffic load from parallel state and federal highways and is the principal east-west truck route in the City (1948 R. 19, 31; R. 81, 110-113, 115, 140, 144, 145). Whether the City spends its own money or money allotted from gas tax funds and fees obviously does not broaden the police power. In any event such funds all come from the same source, the public taxpayer. Moreover, in the long run even the city street which is *not* built as an arterial way takes its place in the national system of highway transportation.

The City's principle attempt at logic and reason is

found in Point V, page 47: In this point the City's argument is entirely hypothetical. The City assumes the grades are not separated now; that the railroad is given a right of way over vehicular traffic which must stop when a train goes by; that accountants and mathematicians cannot calculate the value of benefits to the diverse parties to be received from grade crossings separations; that the City has exclusive property rights by virtue of an easement for street purposes to be free from any interference between rail and automotive traffic at crossings and that the railroad has, apparently, no property or constitutional rights in the matter at all; that the railroad has some undefined legal obligation inherent in the situation over and beyond the requirements of a valid and constitutional exercise of [fol. 217] the police power; that if there were a grade crossing, instead of separated grades, the Santa Fe could run longer trains, grade crossing accidents would be eliminated and the railroad would consequently benefit from good will from fewer accidents and from avoiding delay to motorists. In this way the Commission completely ignores the evidence—the existence of the separations now in place; that there is now no conflict or interference between a train and a vehicle; and that the City commencing in 1931 changed quiet streets and paper streets into a major highway.

The only non-hypothetical argument contained in the City's Brief is that the Santa Fe will benefit because it will possess brand new bridges. The undisputed evidence is that the present bridges are adequate for the foreseeable future (R. 474, 493, 522); that the new larger bridges will cost more to maintain than the existing bridges; and that trains using them are operating within yard limits and restricted to a maximum of 15 miles per hour (R. 480). In any event it would cost less to replace 20 foot bridges if and when the existing bridges must be rebuilt than to build elaborate structures for a six lane highway.

In its conclusion (P. U. C. Br. p. 60) the City expresses the opinion that the railroad should pay all the cost made necessary by its presence and attempts to justify its position because such a "formula" can be made mathematically exact in every case. This argument is answered hereafter in Section VI.

In its brief the City ignores the impact of competitive highway transportation upon the railroad industry and the many related factors upon which so much evidence was introduced. Equitable considerations are not even discussed, because there is no equity in the City's position. [fol. 218] Just as this Court stated in *Wholesale Tobacco Dealers Bu. v. National Candy & T. Co.* (1938), 11 Cal. 2d 634, 644, 82 P. 2d 3 (emphasis added), "*The proper application of the* (police) *power cannot be measured by past precedents—the test is of course present day conditions*" —This doctrine was recognized in the *Nashville* case and is equally applicable here.

Nevertheless great reliance was placed by the Commission and by the City upon a series of cases decided by the United States Supreme Court many years ago. These cases are:

Erie Railroad Company v. Board of Public Utility Commissioners (1920), 254 U. S. 394, 65 L. Ed. 322;

Chicago, Milwaukee and Saint Paul Railroad Company v. Minneapolis (1914), 232 U. S. 430, 58 L. Ed. 671;

Missouri Pacific Railway Company v. Omaha (1914), 235 U. S. 121, 59 L. Ed. 157;

Lehigh Valley Railroad Company v. Board of Public Utility Commissioners (1928), 278 U. S. 24, 73 L. Ed. 161.

Each of these antedate the *Nashville* case, *supra*, which was decided March 4, 1935. Moreover, through each of the cases runs a single consistent thread—the factor of safety as the motivating force requiring the separation of grades and as justifying the imposition of costs upon the railroad. Delay to automotive traffic, increased speeds of automotive traffic, density of population especially in our urban areas, a tremendous volume of vehicular traffic, the problems incident to the expansion of commercial highway carriers, etc., were embryo problems in 1914 when the [fol. 219] *Minneapolis* case and the *Missouri Pacific* case were decided. For instance in the *Minneapolis* case Justice Hughes in delivering the opinion of the Court (which approved a state court decision refusing to allow the

railroad compensation for the cost of a railroad bridge across the gap in its right of way made by the building of a canal) quoted cases using the following language:

> ". . . the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power . . ."

and on the same page:

> "The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience . . ." (L. Ed. p. 675.)

In the *Missouri Pacific* case, *supra*, the Court affirmed a decision requiring the railroad to separate a grade crossing in a city at its own expense by building a viaduct. The railroad claimed the protection of the due process clause of the Fourteenth Amendment. The Supreme Court used the following language:

> "This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and *so long as the means* [fol. 220] *have a substantial relation to the purpose to be accomplished*, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted." (L. Ed. p. 160.)
>
> "The broad authority to require any Railroad Co. to make such improvement, in the interest of public safety, is conferred by the legislature upon the city. The safety of the traveling public is the primary con-

sideration, and this is accomplished by the construction of the viaduct . . ." (L. Ed. p. 161.)

In the *Erie* case decided in 1920, the Court speaking through Justice Holmes, in sustaining an order of a state administrative tribunal which imposed the cost of abolishing certain grade crossings upon the railroad, depended upon a reasonable exercise of police power and emphasized safety factors in upholding the order. He stated:

> "the State . . . has a constitutional right to insist that they (railroad-highway crossings) shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires . . . If it reasonably can be said that safety requires the change it is for them (the states) to say whether they will insist upon it. . . . To engage in interstate com- [fol. 221] merce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the state for the safety of its citizens."

The Court also said (at p. 412):

> ". . . If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small and if we went upon that alone we well might hesitate. But the situation is one that always is dangerous. The board must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion their judgment must stand." (L. Ed. 333.)

The Commission also quotes from the *Erie* case (P. U. C. Br. p. 22), to the effect that the state has a right to insist that a railroad crossing shall not be made dangerous to the public, "*whatever may be the cost to the parties introducing the danger.*" The underpasses everyone admits were completely adequate when constructed. It was only when the City opened Washington Boulevard as an arterial highway that they became inadequate and the only danger existing today—that of vehicles running into the abutments—arose when the City, not the railroad, introduced a huge volume of traffic and the character of [fol. 222] traffic itself changed by the introduction of higher, wider, faster and more dangerous vehicles.

The same emphasis upon safety considerations in the reasonable application of police power to eliminate danger at grade crossings was made by Justice Taft in the *Lehigh Valley R. Co.* case, *supra*, decided 24 years ago, in 1928.

Other cases cited by the Commission and the City likewise stress the factor of safety and with but two exceptions were decided before the *Nashville* case (City's Br. pp. 30, 38 and 43). In *Lehigh & N. E. R. Co. v. Public Service Commission* (1937, Pa. Sup. Ct.), 191 Atl. 380, the Court did not even discuss the many changed circumstances and conditions noted in the *Nashville* case, but summarily distinguished the case on the ground a statute was there involved rather than an order imposed in administrative discretion (Op. p. 383). The case of *State ex rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S. W. 2d 55, preceded the *Nashville* case and can hardly be deemed persuasive now.

The case of *Lyford v. State of New York* (1940), 140 F. 2d 840, cited by the City at page 43 in its brief, was decided under the national bankruptcy statutes and applied a New York statute passed in 1926. The Court relies on the *Erie* case, *supra*, decided in 1914 and there is entirely wanting any clue that the *Nashville* case was even mentioned to the Court! Although this case was decided in 1944, the 1926 New York statute (McKinney's Unconsolidated Laws, Secs. 7903, 8052) required the railroad to [fol. 223] pay half the cost of grade separation construction. In 1939 the New York statutes were amended to

provide that the portion of cost to be borne by the railroads for crossing elimination construction begun after 1938 would be limited to benefits derived by the railroads but not to exceed 15% of the project cost; that the railroads' share would be nothing on State throughways and arterial routes in cities (McKinney's Unconsolidated Laws, 1939, Secs. 9051 to 9063—authorized by Art. 7, Sec 14, New York Constitution, adopted 1938). Thus if the instant case were presented in New York today the railroad would be charged nothing at all. It is with some surprise, therefore, to see the City referring to the *Lyford* case as an expression in New York of the reasonable application of police power (see Ex. 29, R.H. p. 72 for other states which have in recent years limited the amount to be contributed by the railroads).

Further, the above New York decision should be read in the light of later decisions:

In *Elimination of Existing Highway-Railroad Crossing at Spencer, Tioga County* (1938), 5 N. Y. S. 2d 946 (948-950), 254 App. Div. 412, the Court summarized the railroad's position as follows:

> "The argument of the appellant is that the promotion of safety is no longer the main purpose of grade crossing elimination, but that the emphasis has changed so that the main purpose now is the furtherance of an uninterrupted rapid movement by motor vehicles irrespective of the question whether public safety requires such improvement."

[fol. 224] and held:

> "Furthermore, the imposition of such financial burden upon the railroad must bear some reasonable relation to the evils to be eradicated or the advantages to be secured; *it is not sufficient to justify the imposition of such financial burden* upon the railroad *to show that public convenience will be promoted*, but *there must be some reasonable relation between the improvement and the promotion of public safety. Nashville, C. & St. L. Ry. v. Walters, supra.*
>
> "Appellant should be permitted to show the facts alleged in its application for a rehearing, not only as

> to its unfavorable financial condition as revealed by actual experience since the last hearing, but that the elimination places an unreasonable financial burden upon the railroad, because it is not primarily in the interest of safety, but simply for the convenience of the traveling public, or for other reasons not related to the problem of safety."

As showing the acceptance of the benefit principle from the public standpoint, we call attention to *Existing Highway-Railroad Crossings, etc.* (1937), 295 N. Y. Supp. 831, 837, 251 App. Div. 72, wherein the Court said:

> "Neither should the public be compelled to share in an expense which is out of all proportion to the benefit to be derived from the improvement."

A somewhat similar principle was followed in *Austin v. Shaw* (N. C., 1952), 71 S. E. 2d 25.

[fol. 225]

III.

The Nashville Case.

Nashville, Chattanooga & St. Louis Railway v. Walters (1935), 294 U. S. 405, 79 L. Ed. 949.

Both the Commission and the City make a great effort to distinguish this case from the Washington Boulevard situation, as well they must since the *Nashville* case is a forceful presentation of the changing equities in the revolution in the transportation problem and in the incidental grade crossing problem. The Commission sets forth these points of claimed distinction (P. U. C. Br. p. 12):

1. In the *Nashville* case a statute was involved but in our case the Commission has discretion to allocate costs and does not purport to make an arbitrary assessment.

Whether the assessment is arbitrary depends upon the surrounding circumstances and conditions. In any given case the Commission's "discretion" may be exercised just as arbitrarily as Tennessee's 50% statute.

2. The *Nashville* case is based upon special facts and the railroad conceded that in a case such as Washington Boule-

yard the railroad could be required to pay the entire cost (P. U. C. Br. p. 13).

At L. Ed. p. 954 the railroad conceded the rule established by the early cases—a long way from even mentioning the special facts in existence in the Washington Boulevard situation!

3. The United States Supreme Court decided only that the Supreme Court of Tennessee erred when it refused to consider the special facts in the case.

In the *Nashville* case the Supreme Court of Tennessee forthrightly held that it declined to consider the facts re-[fol. 226] lied upon by the railroad. In our case the Commission exercised procedural due process to the extent of listening to the railroad's evidence and then proceeded to ignore the special facts presented and to make findings contrary to the evidence, all of which has been pointed out elsewhere in this brief and Petitioner's memorandum.

3(a). (Following the chronological designation used in P. U. C. Br. p. 13). That in the *Nashville* case the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle.

In our case, regardless of what the planners may have in mind, the effect is the same as in the *Nashville* case. Washington Boulevard is being widened and improved as a feeder into freeways (1948, R. 21, 29, 30 and 47) and to relieve traffic now using Olympic Boulevard, State Highway No. 26, which connects with U. S. Highway No. 101. The City's own witnesses referred to Washington Boulevard as a major highway (R. 561), as a major east-west artery continuous across the city and county (R. 533); and it is shown on the master plan of highways as a major highway (1948, R. 80). The traffic on Washington as previously mentioned is approximately one fourth truck traffic, much of which by actual count consists of the large cross country variety bearing Interstate Commerce Commission licenses. Already, before the bridges are enlarged it is the most heavily traveled route for trucks east and west in the City and more of the large trucks will use it if the bridges are enlarged (R. 145). The end result is an improved and important link in the chain of state and federal highways across the nation helping to enhance the steady

trend of traffic of all kinds from the railroads to commercial motor vehicles.

[fol. 227] 3(b and c). The decision to build the underpass in the *Nashville* case was not in any proper sense an exercise of the police power but a plan for a nation-wide system of super-highways in active competition with the railroads.

This point duplicates to some extent 3(a) above. Note that the trial court in the *Nashville* case really said that the police power was no more involved in connection with building the underpass than with elimination of curves, grades, widening of the pavement etc. (L. Ed. p. 956).

3(d and e). Relief of unemployment was the main incentive for building the highway.

Regardless of motivation, the victim of a grade crossing collision is just as hurt on a depression built highway as on any other, and the police power is just as applicable to one as to the other. Safety factors are just as applicable whether the highway be a federal aid highway or an arterial city street. Without the latter the federal aid highway out in the country would be rather useless, since the truck must come to town on a city street. Washington Boulevard as a link in the national system of highways is, with Alameda Boulevard, a few hundred feet west of the underpasses, the focal point of truck traffic and the center of gravity of such traffic to and from the industrial district and to Los Angeles harbor (1948, R. 89).

3(f and g). (P. U. C. Br. p. 14.) In the *Nashville* case the existing highway was considered safe and adequate [fol. 228] by the City authorities and after the new highway was built the nearby grade crossing would remain.

In our case no train and motor vehicle can possibly collide for there is no grade crossing. The existent situation was entirely adequate to take care of the garbage trucks for which the underpasses were originally built. We have there therefore a situation in which the City is like a camel that stuck its head in the tent. In 1914 the grade was separated for the sole purpose of providing access for the City's garbage trucks into the area east of the underpasses. In 1931 the City commenced the opening of Washington Boulevard as an arterial highway and the camel

got its head into the tent by virtue of an order of the Public Utilities Commission requiring the railroad to pay 25% of the cost of bridges 56 feet wide. For reasons not stated in the record, the City did not build the bridges authorized in 1932. By 1948 the City wanted railroad overpass bridges wide enough to accommodate six lanes of vehicular traffic instead of four, and with the current order of the Commission the camel has taken possession of the tent.

The Commission again alludes to "local traffic needs." Upon analysis this terminology is rather elusive and can mean many things. Washington Boulevard is local in the geographical sense and it unquestionably carries traffic that travels only short distances, or local traffic. But in drawing a distinction between Washington Boulevard and the highway in the *Nashville* case the importance of Washington Boulevard as a right of way for traffic competitive with the railroad should hardly be ignored.

[fol. 229] 3(i). (P. U. C. Br. p. 15.) Federal funds were to help pay for the underpass and the underpass was to be built in order to qualify for such funds, not to meet local traffic needs.

The matter of source of funds has already been discussed above, as has the matter of local vs. long haul traffic. Of course, the federal authority in making the construction of underpasses a condition upon which funds would be advanced approved such construction "as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation" (L. Ed. 961).

4. The Commission states that no new route is being established (P. U. C. Br. p. 16).

Such a statement shows a short memory. Before 1931 the underpasses were used only by the City's garbage trucks. In that year the bridge over the Los Angeles River a short distance east was opened and the underpasses were opened to public travel. A new route was certainly established then. Progressively Washington Boulevard has been widened and improved to a six lane arterial route which differs from a freeway only in that it is not a limited access highway. A slow traffic, narrow street changed over the

period of a few years to a six lane artery from the ocean to east of the City is a new through route.

The City Brief (p. 40) adds other alleged distinguishing features:

[fol. 230] 1. That Washington Boulevard was not designed as part of a nation-wide system of highways and does not parellel the railroad.

Nevertheless, Washington Boulevard is being improved by the instant proposal to relieve some of the traffic congestion on Olympic Boulevard, a State highway which parallels Washington Boulevard a short distance north. That the commercial users of highways do not necessarily follow the markers designating state and federal highways is demonstrated by the use the trucks make of Washington Boulevard. It is the natural route for such traffic, from the center of gravity as Mr. Dorsey, the City's witness, called it. Because of its popularity with the commercial highway carriers it is the classic example of a highway system competitive with Petitioner.

2. The City states that in the *Nashville* case the railroad was to pay half the cost directly and a portion of the other half indirectly, a portion by federal aid and "only a very small portion" by the truck and bus owners.

The only difference here is that there is no federal contribution. Manifestly the Santa Fe pays tremendous property taxes on its privately owned right of way. Whether these funds are spent on schools or highways is under public control. In addition to the direct charge of half the cost the railroad would have larger bridges to maintain at increased cost of maintenance. The "indirect costs" are so high that including the cost of taxes the railroads pay 23 cents of their gross revenue dollar for the ownership and maintenance of their rights of way while the motor vehicle [fol. 231] commercial beneficiaries of a new improved Washington Boulevard pay only 3.7% of their gross revenue dollar for their public built, railroad subsidized highway rights of way (Ex. 29 R. H.; R. 204). This is discrimination where it hurts, an exaction from the railroads for the benefit of their competitors. Some place along the way discrimination becomes unconstitutional. Petitioner fervently believes the time is now.

There are points of similiarity between the special facts

in the *Nashville* case and the special facts in our case, none of which are mentioned by either the Commission or the City:

1. Revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles (L. Ed. p. 956).

2. The assumption of the Federal Government of the functions of road builder—so that city streets, particularly arterial truck routes, connect with a nation-wide competitive highway transportation system.

3. The resulting depletion of rail revenues, obscured in recent years by temporary war traffic.

4. The change in the character, the construction and the use of highways.

5. The change in the occasion and purpose for elimination of grade crossings, which is now uninterrupted and unimpeded traffic flow, and in the chief beneficiaries thereof, which is the traveling vehicular public.

6. The change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents; *e. g.*, large, faster, [fol. 232] dangerously laden vehicles which cause damage to railroads.

7. The main purpose (the object sought to be attained) of grade separation is now the elimination of delay and the furtherance of uninterrupted, rapid movement by motor vehicles (L. Ed. p. 959).

8. The railroad has ceased to be the prime instrument of danger and the main cause of accidents.

9. Before the system of federal-aid highways were built on a county level and served, in the main, local traffic. Long distance traffic was served almost wholly by the railroads and water lines. Under such conditions the occasion for separating grades was mainly the danger incident to rail operations and promotion of safety was the main purpose of grade separation (L. Ed. p. 960).

10. During the system of county roads, the need for eliminating existing crossings, and the need for new highways free from grade crossings, arose usually from the growth of the community which was mainly the result of the transportation system offered through the railroad and the highways were then feeders of rail traffic so that com-

munity growth *and highway improvement* benefited the railroad (L. Ed. p. 960).

Los Angeles is the largest city that has grown up since the coming of the motor vehicle. It is truly a decentralized city that grew with the motor vehicle; the City with its satellites is fully served by motor vehicle. It is recognized as a city that grew not around railroads, but with motor vehicles as a basis for its widespread economy. The motor vehicle has been responsible not only for its growth, but also for its congestion which is typical of all of California. [fol. 233] 11. Federal-aid highways are not feeders of rail traffic but deplete rail traffic and intensify motor competition. Likewise a six laned Washington Boulevard is not a feeder of rail traffic but inures primarily to the benefit of the suburbanite and competitive motor traffic. The wagon road and the road for local truck traffic were true access highways. The fine arterial streets and highways just intensify competition; otherwise railroad business would have kept pace with the expansion of streets and highways and the growth in population.

12. Avoidance of traffic interruptions incident to crossings at grade are now of far greater importance to the highway user than to the railroad (L. Ed. p. 960).

13. The grade crossing in the *Nashville* case was not dangerous as attested by the occurrence of only two minor accidents in ten years and these were settled for only $50.00. The crossing was protected by the most modern electrical device. In our case there is no grade crossing and the railroad has paid nothing on account of grade crossing accidents because there has never been even one. Nor has a single cent ever been paid on account of any collision with the abutments of the bridge.

14. Practically all vehicles using the new highway in the *Nashville* case would compete for traffic with the railway—buses, trucks, some of them 70 feet in length and with a load as much as 50,000 pounds would compete for the most profitable classes of freight thus reducing the volume of traffic and compelling reduction in rates. The same is true in the Washington Boulevard case except for the com- [fol. 234] muters and suburbanites. The short haul traffic is practically all lost from the rails, and most of the intrastate business is hauled by truck. Now the competition is

keen for even the long haul freight and particularly for the premium classes of freight (R. 368).

15. While the railway, the sufferer from the construction of new highways, is burdened with one-half the cost of the underpass, the owners of trucks and buses and others who are beneficiaries are immune from making any direct contribution. The Court stated that nearly 28 per cent of the gross revenues of the railway were required to pay the state and local taxes and maintain the roadway, acquired and constructed at its own expense; while, the commercial motor carriers in Tennessee paid in state and local taxes not more than 7 per cent of their gross revenue for use of the highways (L. Ed. p. 962).

Petitioner relies upon the *Nashville* case in the belief that no fair appraisal of reasonableness in the exercise of police power can here be made without reviewing the Commission's order in the light of changed conditions noted in Justice Brandeis' opinion and without cognizance of the fact that these changed conditions are more pronounced now than they were at the time the *Nashville* case was decided.

Lastly, the *Nashville* case is the most recent pronouncement of the Supreme Court of the United States upon the subject.

[fol. 235] IV.

The Benefit Basis for Apportioning Costs Is Synonymous With a Reasonable Exercise of the Police Power for the Health and Safety of the Public, and Its Application Is a Practical Solution in This Matter.

This is the unusual and perhaps the exceptional case in which the railroad can, with reason and justice, contend that it will not be benefited, and that it should be assessed no part of the costs. This case involves the expansion of a street not in existence before 1931 into an important major arterial highway, which just coincidentally happens to be the principal east-west commercial route competitive with the railroad. The grade has already been separated, so that enlarging the present 20-foot wide underpasses to a six-lane highway is very little different in principle from a situation that would exist if the City were constructing a new freeway or arterial highway under Petitioner's

tracks. The finding of the Commission that Washington Boulevard is to be widened for local traffic needs, wholly disregards the evidence and is a finding actually contrary to any fair appraisal of the evidence.

In the usual situation the grade separation construction results in the closing of the grade crossing. In *Southern Pacific Company v. Public Utilities Commission*, S. F. No. 18704, also pending upon a Petition for a Writ of Review, the usual situation is presented. This case involves the construction of a grade separation at Los Feliz Boulevard [fol. 236] in the City of Glendale, in which the Commission ordered the Southern Pacific Company to pay 50% of an elaborate structure costing $1,493,200.00. The Southern Pacific Company offered to pay the amount which represented benefits to be received by the railroad, and introduced uncontradicted evidence of the value of benefits to the railroad. Likewise in the Washington Boulevard case the Santa Fe will willingly pay any reasonably apportioned expenses on a benefit basis, if there are such benefits. The record, up to the present time, fails to show any benefit will accruo to Petitioner.

But the City states that benefits cannot be figured with any degree of certainty. The undisputed evidence is to the contrary. Thus, Chapter 8, page 68, of Exhibit 29 R. H. sets forth numerous instances where benefits have been analyzed and calculated. This study reflects the interest shown in the problem in other states and was prepared by Arthur C. Jenkins, who for 11 years was an engineer employed by the Public Utilities Commission, trained in the factors presented by the cost apportionment problem. For ready reference Chapter VIII is set forth herein:

Benefits to Railroads From Grade Crossing Separations.

NATURE OF BENEFITS.

It can be stipulated that when the two streams of traffic are separated by construction of a highway-railroad grade crossing at different grades, there will be physical benefits derived by both the railroad and users of the highway. [fol. 237] The accident hazard will be eliminated and delays to both rail and highway traffic will be avoided. Economically the existence of benefit is not so conclusively evident. The question is whether the end justifies the means

and if it does, who should carry the financial burden. If the burden is to be divided, then what are the relative benefits accruing to principal parties.

There appears to be a considerable lack of understanding as to the extent to which the railroad will be benefited, the general assumption being that its measure of value is high and approaches justification for a so-called fifty-fifty proportion of cost allocation.

In the interest of clarifying this point, much work has been done in different sections of the country in developing detailed analyses to show the actual facts as related to specific railroads in some of those states where legislation on the subject was under consideration.

Benefit Analysis in Michigan.

In the State of Michigan an analysis was made of grade crossing elimination costs experienced by eight Class I railroads for the period from 1925 to 1945, inclusive. The purpose was to ascertain the difference between the annual costs of maintenance, protection, and accidents at those crossings before separation of grades for comparison with the annual cost after separation.

The study covered 153 projects which eliminated 167 crossings at grade, 103 by underpasses, 49 by overheads [fol. 238] and 15 by closings and diversions. The results were as follows:

Total Costs of Projects		$32,228,895
Average Cost Per Project		192,987
Annual Cost Prior to Separation:		
Maintenance and Protection	$169,070	
Average Annual Cost of Accidents	14,177	
Total Annual Cost		$ 183,247
Annual Cost After Separation:		
Maintenance and Renewal of Portions of Structures Maintained by Railroads		123,724
Net Annual Saving		$ 59,523

This net annual saving capitalized at 5% represents $1,190,000.00, or 3.69% of the total cost of the eliminations and indicates a fair measurement of the benefit derived by the railroads as being approximately 4 per cent.

Benefit Analysis in West Virginia.

The same procedure as described above for Michigan was followed in connection with the railroads of West Virginia covering the period from 1926 to 1945, inclusive, including 112 projects. In the aggregate, 153 grade cross-[fol. 239] ings were eliminated, 24 by underpasses, 35 by overheads and 94 by diversions and closings. The results were as follows:

Total Cost of Projects		$11,498,888
Average Cost Per Project		75,156
Annual Cost Prior to Separation:		
Maintenance and Protection	$35,503	
Average Annual Cost of Accidents	5,897	
Total Annual Cost		$ 41,400
Annual Cost After Separation:		
Maintenance and Renewal of Portions of Structures Maintained by Railroads		43,902
Net Increased Cost After Separation		$ 2,502

On this set of projects there was no benefit to the railroads, but actually an increase in cost.

Benefit Analysis in Indiana.

Similar studies were conducted relative to railroads in the State of Indiana, covering 148 projects constructed during the period from 1926 to 1941, inclusive. There were 110 grade crossings eliminated, 63 by underpasses, 76 by

[fol. 240] overheads and nine by diversion and closings. Results of the analysis were as follows:

Total Cost of Projects		$16,891,090
Average Cost Per Project		153,555
Annual Cost Prior to Separation:		
Maintenance and Protection	$71,771	
Average Annual Cost of Accidents	17,561	
Total Annual Cost		$ 89,332
Annual Cost After Separation:		
Maintenance and Renewal of Portions of Structures Maintained by Railroads		55,529
NET ANNUAL SAVING		$ 33,803

This amount capitalized at 5% represents $676,000.00, or approximately 4% of the total cost of the eliminations.

BENEFIT ANALYSIS IN OTHER STATES.

Similar studies were made in other states and the capitalized annual savings resulted in percentage of total costs as follows:

State	*Railroads*	*Year*	*Per Cent*
Ohio	NYC and Erie	1939	9.58
Illinois	21 Class 1 Roads	1939	2.32
New York	Class 1	1940	Deficit

[fol. 241] BENEFIT ANALYSIS IN CALIFORNIA.

In connection with a proposal of the State of California, Department of Public Works, Division of Highways, to construct a grade separation between state highway and main line track of Southern Pacific Railroad Company near Goshen in California, request was filed with the Railroad Commission of the State of California (now the Public Utilities Commission), under Application Nos. 18024 and

19101. By its Decision No. 25651, dated January 16, 1933 (38CRC386), the Commission authorized the separation and allocated costs of construction on a benefit basis, which is described by the following excerpt from the decision.

> "After carefully considering all the evidence in these proceedings, it is concluded that . . . the order should . . . fix the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits. This sum is arrived at by capitalizing an amount measuring the annual benefits and privileges on a 6 per cent basis."

Upon that basis the railroad was assessed $15,000.00 only, out of a total cost for construction of $343,000.00. The determination of amount was derived from a cost analysis submitted by the railroad substantially patterned along the lines of the various analyses cited above for other states.

In commenting upon its action in that proceeding, the Commission stated in its Opinion (38CRC386):

[fol. 242] "In allocating the costs here we are departing from the practice which has obtained generally heretofore of asserting one-half to each the public and the railroad in the case of an existing grade crossing. While this procedure has appeared equitable in the past, the tremendous changes in transportation conditions make necessary a reappraisement of the liabilities of the two parties at interest. The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfares, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the rail line. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic."

Distinction Between New Separation and Enlargement of Existing Separation.

It should be kept in mind that all of the analyses cited above apply to NEW grade separations where some measure

of benefit is derived by the railroads. They do establish a measure of reasonable allocation of cost where such benefits accrue to the railroad and automatically fix that percentage at zero in cases of enlarging existing structures where it is conceded that no benefit is enjoyed by the railroad.

[fol. 243]

V.

The Arguments Presented by the Public Utilities Commission and by the City Are Immaterial to the Issues and Reveal the Arbitrary Character of the Commission's Order.

Both the Commission and the City indulge in certain arguments that logically appear to be wholly immaterial to any issue arising herein. For instance, the Commission refers to the Santa Fe's operation of commercial vehicles on the highway, to the increase in the value of Santa Fe stock, and to the claim that the City's contribution must come from local funds (P. U. C. Br. pp. 11, 36).

Petitioner is entirely in accord with the thought that its subsidiary in the trucking business should pay a fair share of the cost of its own rights of way; namely, the public highways, and that the subsidiary has neither a moral nor a legal justification for requiring the parent railroad to help build highways and bridges, for the benefit of competitors of the railroad.

Concerning the necessity of using local funds, these projects can be partly financed from the City's share of State gasoline tax contributions, and often from additional allotments from the County's share of such funds (R. 209, 427, 448; Ex. 29 R. H., p. A-19); however, whether or not the City received a fair share of the tax funds is not relevant to our problem.

The Commission attempts to explain away the *Goshen Junction case* (1933), 38 C. R. C. 380 (P. U. C. Br. p. 28) upon the ground that the then existing depression led the Commission to consider the economic situation and thus change to the benefit method of apportioning costs. In that case, decided nineteen years ago, the Commission expressly [fol. 244] departed from charging the railroad on an arbitrary "obligation" theory and assessed costs to the railroad based upon direct and indirect benefits arrived at by

capitalizing an amount measuring the annual benefits on a six per cent basis. Furthermore, the Commission noted that traffic on the highway had increased and changed in nature and had become directly competitive with the rail lines (see Ex. 29 R. H., Chs. IV and V). This trend has of course continued at an accelerated pace during the past 19 years (see Pet. Op. Br. p. 80, for a more complete statement of this case as well as Railroad's Br. pp. 64-72).

It seems the Commission's opinion is based upon an unexpressed conclusion something like this: The City needs help in financing the new and improved Washington Boulevard and does not desire to use its allocations of state gasoline tax funds and motor vehicle fees for this project. The railroad has been earning a small per cent of profit in recent war and post war years and is able to pay; therefore, why not find a way to require the railroad to pay 50% of the cost now even though it was charged only 25% in 1932.

How else can the Commission's decision be justified or explained? The only answer given in the Commission's opinion is that material changes have taken place since 1932—increases in population and tremendous increase in motor vehicle traffic—but these were the changes pointed out in the *Goshen Junction* decision, *supra*, as requiring a departure from assessing costs on an obligation theory and assessing them on the benefit basis instead. The depression in 1932 is hardly a logical basis for distinguishing the *Goshen Junction* case since it should be remembered that in 1932 we were all in the same hard pressed financial con-
[fol. 245] dition, that is, railroads, citizens, cities and taxpayers alike.

Further, these material changed conditions set forth in the 1932 opinion are such that to require the railroad today to contribute even 25% would be arbitrary and unreasonable. (*Nashville etc. v. Walters* (1935), 294 U. S. 405, 79 L. Ed. 949.)

Since the foundation of the Commission's authority is the police power and only the police power—certainly not the existence of a railroad treasury or ability to pay—can it be that since 1932 a reasonable application of that police

power has changed so materially as to justify ordering the railroad to pay twice as much of the original percentage cost? Neither the Commission nor the City has made any attempt to answer this embarrassing question. Since the Commission makes no logical explanation we can only speculate that the Commission in its 1952 decision decided upon a result satisfactory to the individuals responsible for the decision, having as most of us do natural bents and biases. But we do not have to speculate about the generalities indulged in in the Commission's opinion—they reveal better than anything else how difficult it must have been to write the opinion and to attempt to explain why after 20 years of tremendous highway development and growth of competitive trucking, etc., it was reasonable under the police power to make the railroad pay at double the 25% rate charged in 1932, when in fact, this percentage was too great as judged by the modern conditions.

This then is the real distinction and difference between 1932 and 1952—the whim and caprice, the arbitrary application of "discretion" wielded by men unguided by any [fol. 246] rule or yardstick used to measure *reasonable* application of police power with a view to current conditions and without any effort to make the apportionment bear a substantial relation to the legitimate object sought to be attained.

VI.

The City's "Obstruction Theory" That the Railroad Should Pay All the Costs of the Grade Separation Resulting From the Presence of the Railroad Tracks Is Unrealistic, Unreasonable and Legally Indefensible.

Throughout the proceedings the City has steadfastly maintained that because it has 90-foot easements (City's Br. p. 10) for Washington Boulevard it has right to prevent any use of the ground beneath or the space above the easement in any manner which directly or indirectly interferes with the utilization of such an easement for street purposes (P. U. C. Br. p. 18, City's Br. pp. 6, 60); that because of such legal rights to noninterference the City is entitled to require the railroad to pay the additional cost

resulting from and necessitated by the presence of the railroad tracks, in this case over $700,000.00 (City's Br. p. 16). The same argument could be made in connection with freeway construction in the City. If houses weren't in the way the cost of right of way procurement would be reduced.

The title report (Ex. 59 R. H.) refutes the City's claim. To summarize briefly, the Harbor Line or the westerly tracks across Washington Boulevard are held under a deed dated August 25, 1887, granting the fee in a sixty-six foot wide right of way to the railroad company. The Harbor [fol. 247] Line was in actual use September 23, 1887 (Ex. 64 R. H.). The tracks toward the east composing the railroad's Third District, Main Line, are on land condemned by Respondent's predecessor November 20, 1887, and granted in fee by deeds dated November 22, 1889, and April 9, 1890. This line was in actual use November 24, 1888. Not until December 15, 1890, was the dedication of the streets in the area of the underpasses accepted by the City and there was no dedication by user as shown by the testimony of William F. Martens (R. p. 452). Mr. Martens testified from personal observation that in 1914 there was no street across the Santa Fe's tracks at or near Washington Boulevard. Under these circumstances no franchise from the City is necessary and the railroad's rights are property rights.

In any event, the City found it necessary in 1930 to condemn additional property from the Santa Fe in order to increase the width of its easement for street purposes at the location of the underpasses from sixty to ninety feet, for which the City paid the magnanimous sum of $1.00 for each of five parcels. These titles to land are property rights which the Santa Fe is entitled to have protected under the state and federal constitutions. The City has no more right to unimpeded use of the City's easement than has the railroad to an unimpeded use of a railroad easement or of a railroad interest in the land owned in fee, even though the City subsequently acquired an easement for street purposes. [fol. 248] In *City of Oakland v. Schenck* (1925), 197 Cal. 456, 241 Pac. 545, the railroad appealed from a judgment granting the nominal sum of $1.00 for railroad lands con-

demned by the City of Oakland. Concerning the railroad's property rights, the Court stated as follows:

"It may not be questioned that a railroad's right of way is so far private property as to be entitled to protection of the constitution, so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of that power is that the statute conferring it make provision for reasonably compensating the owner. (*Western Union Tel. Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 570 (1 Ann. Cas. 517, 49 L. Ed. 312, 25 Sup. Ct. Rep. 133, see also Rose's U. S. Notes).) The interest appropriated by the party condemning may be small, and the amount of compensation difficult of proper measurement, but some award should be made, however small the amount may be. . . . *If the opening of the street across the railroad tracks in this case does not unduly interfere with the companies' use for legitimate railroad purposes, then their compensation should be nominal.* (P. 460.) *If, prior to the institution of the condemnation proceedings, the railroad companies had constructed upon the land embraced within the crossing buildings to be used in their business, it would have been necessary, in ascertaining the just compensation to be awarded, to take into consideration the value of such improvements.* (P. 461.) Appellants cannot recover for such costs. The expenses that will be incurred by the railroad companies in making structural changes, such as filling the portion of the tracks between the rails, and two feet outside, with planks, and [fol. 249] other crossing changes, in order that the railroad may be safely operated, necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken into account by the railroad companies when they accepted the privileges and franchises granted by the state. *Such expenses must be regarded as incidental to the police power of the state.* (P. 462.) The acquisition by eminent domain of an easement for street purposes by a municipality is one thing. *The power of the public to require, by subsequent proceedings, that its*

> *highways be made safe to another. . . .* The duty resting on the railroad companies to make the necessary changes and improvements does not arise because of the opening of the street, but because of the obligation imposed through the exercise by the city of the power to order the crossing improved *whenever it becomes necessary for the protection of life and property.*" (P. 462.) (Emphasis added.)

Further defining the property rights held by a railroad in California, the Court stated:

> "In this state there is no such restriction on the right of a railroad company. It may acquire the fee in land by direct purchase, although it may obtain only an easement for railroad purposes if it resort to proceedings in eminent domain." (P. 466.)

The fact that the railroad may, regardless of its property rights, acquire a franchise right to cross the street from the City in no way estops the railroad from claiming all of its constitutional rights incident to property ownership. (*City of San Diego v. Southern Cal. Tel. Co.* (1949), [fol. 250] 92 Cal. App. 2d 793, 808, 208 P. 2d 27, and *Ocean Park etc. Corp. v. Santa Monica* (1940), 40 Cal. App. 2d 76, 104 P. 2d 668.)

We therefore come back to the incontrovertible proposition that, as the City says (City's Br. p. 34): "The instant case represents an exercise of the police power." The railroad's property rights are not dependent upon any reduced status as a citizen, but it is entitled to assert its rights incident to property ownership. Finally, the railroad may not be charged and its property may not be taken under the police power or under the theory of *damnum absque injuria* except upon reasonable application of police power, taking into consideration such factors as which party introduced the danger, and any assessment of costs upon the railroad must "have a substantial relation to the *purpose to be accomplished.*"

Remember that in the 1949 opinion the Commission stated it was *impressed* by the fact that but for the existence of the railroad the City could widen the street at less cost

(49 Cal. P.U.C. 147, at p. 151.) A decision so influenced is patently arbitrary.

In other words, the fact the City holds an easement for street purposes is something very different from the right to require the railroad to participate in the cost of the street, which can be done only when public safety is reasonably involved.

It was further pointed out in *Black v. Southern Pacific* (1932), 124 Cal. App. 321, 331, 12 P. 2d 981, 985:

> "But it is well settled that a railroad right of way is so far private property as to be entitled to the protection of the Constitution, and that it can only [fol. 25] be taken without its consent under the power of eminent domain, a condition precedent to such taking being that provision be made for reasonable compensation to the company."

Thus the conclusion to be reached is that where public safety is not involved, there is no duty on the railroad to expend any of its funds for any portion of the costs of grade separations. (Compare *Northwestern Pac. R. R. Co. v. Superior Court* (1949), 34 Cal. 2d 454, 211 P. 2d 571, holding that a municipality may not interfere with the railroad use of property owned by the railroad even though it pays adequate compensation in condemnation proceedings and then only subject to the orders of the Public Utilities Commission.)

The railroad is, of course, a quasi public corporation. Its lines are devoted to the public use and because of its status it is required to accept the regulation of public authority, but it is, nonetheless, a private owner of property. As an obstructor of the City's desire to widen the street without any additional expense, Petitioner's position is simply this, that in addition to its property rights the rail lines fulfill a public use the same as city streets. The railroads give a *quid pro quo* in service to the public at large in return for their right, based on public need and practical necessity, to operate trains without stopping at traffic signals, and to cross streets, highways, and rivers, etc. The Santa Fe believes that the streets and the rail lines both serve a necessary purpose.

[fol. 252] VII.

Recent Material Changes in Highway Construction and Use, as Well as the Competitive Position of the Railroads, Require a Reappraisement of the Problem of Allocation of Grade Separation Costs.

A few of the significant changes as applied to this matter are worthy of special note and answer the charge "material changes" justify making the railroad pay more:

1. Even allowing for inflation the cost of a "viaduct" built in years gone by is dwarfed by the cost of the elaborate edifices proposed by the applicant in the instant case—a material change indeed!

2. Though the City says in its brief that Washington Boulevard is not a freeway, neither does it resemble the city street of a few years ago. Instead Washington Boulevard is being built into a wide, six lane, cross-city and cross-country thoroughfare intended to carry today's dense traffic expeditiously, to relieve other streets and nearby state highways of traffic congestion, and to expand its capacity as the principal east-west truck route in the City.

3. Vehicles have increased in speed, size and width as well as in speed and volume, making necessary wider highways with wider lanes and more elaborate bridges.

4. The railroads have not expanded materially since the 1920s (R. 212, 251) except for the handling of war traffic (R. 391). Their rights of way, their number of trains and cars have remained nearly static and have not kept pace with the trend of increase of population. [fol. 253] Trucks have taken away substantially all their local traffic and provide for the increased population, so that to only a nominal extent have the railroads shared in the benefits traffic-wise of increasing demands for transportation by an increasing population (182 I. C. C. 253; R. 204).

5. Expediting an ever increasing flow of vehicles to permit more rapid movement between local and distant points without delay at grade crossings has become the important factor and reason for constructing through traffic streets and highways (R. 85, 198, 218, 245).

Thus when the cases say as do even the earlier ones

such as the *Omaha* case, *supra*, that the imposition of costs on the railroad must have *a substantial relation to the purpose to be accomplished*. Petitioner earnestly believes that neither the City nor the Commission should be permitted to take refuge in decisions applicable to the conditions of many years ago; that in this case the Commission just as effectively disregarded the changed circumstances as did the Supreme Court of Tennessee whose action was condemned in the *Nashville* case.

To the casual observer over the past several years, it is obvious that the use of our streets and highways today is entirely different than the use made of them ten, twenty, thirty and forty years ago. Prior to the zenith of railroad development, that is, prior to the early 1920's, the Model T, the horse and wagon, the buggy and the buckboard constituted a large portion of the traffic. A journey of fifty or a hundred miles consumed hours and a transcontinental trip by automobile was a venture. Commercial trucking over long distances was non-existent. *The rails enjoyed a virtual monopoly.*

[fol. 254] Although change in laws and legal viewpoints is slow, progress of highway development has been rapid; so rapid that the legal concept of "continuing obligation" has been outmoded and the obligation has shifted. It is the users and builders of our streets and highways who are disturbing the *status quo*. It is the latter group which is now expanding aggressively and building over and across the steel rails that have been in place for many years. It is the users of the highways who should be required to pay for their own paved right of way. If the trend toward highway development continues as in the past several years and if our states continue to require the railroads to help provide rights of way for a competitive transportation system, what effect will such a policy have on the economic health of the railroad industry, which for the past twenty years has realized only 3.2 per cent net return on its investment (R. H. Tr. 360)? Should not "continuing obligation" give way to "shifting obligation" just as the railroads' monopoly on long-haul overland transportation has given way over the past twenty-five years?

Washington Boulevard reflects the same changes that

have been going on throughout the state and nation (Ex. 29 R. H., Tables 1, 2, 3, 4 and 5). These tables show quite graphically the tremendous increase in recent years of automobile, truck and bus registration. Truck and bus mileage almost doubled from 1936 to 1948 in spite of the war years, a rubber shortage and other shortages. A glance at Table 2 explains fully why the railroads reached their apex of development in the early 1920's and then failed to keep pace with the growing population. Truck registration in the United States was less than 2,000,000 in 1923, [fol. 255] less than 1,000,000 in 1919, but was 7,692,569 in 1949. In California in the seven years between 1941 and 1948, truck registration increased from 343,853 to 547,208. In 1933, the year of the *Goshen Junction* decision (38 C. R. C. 380) when the Commission departed from the fifty per cent formula, there were only 108,189 trucks in California.

Today in the United States there is one truck for every six and one-half automobiles, and it is common knowledge that the highway boxcars have been getting larger and larger. In 1910, the ratio was one truck to forty-seven automobiles (Ex. 29 R. H. 26). The traffic check made on Washington Boulevard (Exs. 39, 40 and 41) revealed an even greater percentage of trucks to automobiles than similar checks on state highways. On Washington Boulevard the ratio was approximately one truck to four automobiles. A comparative traffic count on Highways 101 and 99 showed a minimum ratio of at least six to seven automobiles to one truck (see Ex. 29 R. H., pp. 31-32).

In 1926, the railroads carried eighty-nine per cent of the passenger traffic, buses only 10.9 per cent, but in 1941 the railroad portion was reduced to 68.3 per cent and the bus portion had reached 31.7 per cent (R. H. Tr. 41). Looking at freight traffic in 1926, the railroads carried 450,644 million ton miles as compared to 23,530 million for trucks. In 1941, the railroads handled 480,783 million ton miles, trucks 57,123 million. Increase for the trucks was 142.8 per cent. From 1944 to 1947, the [fol. 256] increase in truck traffic was 58 per cent. This trend continues apace.

In contrast, in 1916, there were 254,000 miles of rail-

way line. In 1949, only 225,100 miles. The effect of Washington Boulevard and similar streets has been to shift short-haul freight traffic from the rails to the trucks, particularly in metropolitan areas such as Los Angeles (Tr. 235, 368). The same is true of passenger traffic (Tr. 482). A wide, expensively built arterial highway, such as Washington Boulevard, is not necessary to move either freight or passengers to the railroad depot and freight house. The wagon and the horse did that adequately over dirt roads and an improved Washington Boulevard is an invitation to take even more traffic from the rails. Washington Boulevard and the highway involved in the *Nashville* case, *supra*, have much in common—both have the effect of shifting traffic from railroad to truck.

In order that the Commission might be fully advised Petitioner placed in evidence at the rehearing an extensive and very complete report, entitled "Elements to Be Considered in Eliminating Railroad-Highway Grade Crossings Allocating Cost of Construction and Enlargement of Separations Evaluating the Accident Hazard and Determining the Relative Benefits." This extensive exhibit of some 110 pages, which was received as Exhibit 29 R. H., is briefly discussed in Petitioners' Summary of Facts (Pet. pp. 26-33). The author, Mr. Arthur C. Jenkins, is an outstanding Consulting Engineer, and for eleven years [fol. 257] was an engineer for the Public Utilities Commission (R. 178). His comprehensive written report and oral evidence probed the fundamentals of this problem before the Court. While the report is too extensive to quote in full, there are here included certain pertinent portions of its text which bring out clearly the salient points of the problem as related to the particular separations in question:

> "During the period of rapid growth of railroad mileage between 1830 and 1916, the highways existing at that time served largely as feeders to the railroads. They brought the raw materials and produce to the railheads for shipment to other parts of the country and similarly they carried the finished goods away from the rail heads after the manufacturing process had been completed and the finished goods

were ready for distribution. In this fashion the railroad and the highway were transportation agencies conducted in a complementary fashion.

"By 1916, however, the era of rail transportation took a turn and the highways came back into prominence. Both private automobiles and trucks began to increase their extent of operations and the passenger bus was appearing upon the scene. Highway competition for intercity traffic, although at that time in an embryonic stage, was destined to grow increasingly important with the passage of time. This transition between modes of transportation and revival of the highway system as an important means of national transportation was influenced materially in its development by the Federal Aid Program for Highway Construction inaugurated in 1916." (P. 43.)*

[fol. 258] "There is a definite relationship between the railroads of the country and the vast and extensive highway system. Railroads are experiencing more and more the competition from the rival forms of transportation operating over the highways both in passenger service and in freight operation. The competition that is created by the modes of transportation on the highways, although it has had a harmful effect upon rail transportation and in other regards, cannot be considered as not in the interest of progress or human development. The highway has brought with it the more flexible rubber-tired mode of transportation and has made it possible to serve a much greater territory directly than has heretofore been the case by railroads alone whose lines by reason of their character are inherently restricted in their total coverage. The competitive aspect, nevertheless, is of serious proportions, particularly in view of certain inherent differences between the two types of operation.

"The growth of population in the State of California has been much more phenomenal than that for the nation as a whole. From a population of 379,994

*Page references are to pages of Exhibit 29 R. H.

in 1860 there has been an increase to 10,472,348 in 1950. The average increase per decade over that period of years has run in the vicinity of 45 or 50 per cent per period.

"In view of these tremendous increases in population it is no wonder that the State of California, particularly in its metropolitan areas, is undergoing such growing pains with respect to its vehicular traffic arteries, thereby necessitating the continuous development of new ways and means of accommodating greater traffic volume by widening and increasing capacity of existing thoroughfares. This again is a [fol. 259] clear indication that such *increases in capacity and construction of roadways and expressways are for the sole purpose of accommodating the increase in vehicular traffic with no relationship whatsoever to the railroads operating in the area under and over whose tracks it may be found necessary to route the new roadways and older ones that are in process of enlargement.*" (P. 8.)

"In carrying out a plan of grade crossing separation, whether it be a single installation or a coordinated program of large-scale construction involving numerous locations, it would appear that logically the theory to be applied in establishing formulae for allocation of cost should be the same. Furthermore, any such project should be viewed in the light of conditions as they exist at the present time and determinations should be based upon a careful analysis of the equities of parties concerned giving due consideration to those factors making it necessary to accomplish the objective, the recipients of the benefits to be derived and economic effect upon the railroads.

"From the point of view of law, the practice is to give material weight to precedence established in previous actions. This practice tends to perpetuate the theories promulgated as a result of conditions existing many years ago without giving due regard to the effect of the tremendous progress in technological development and advancement in mechanization of industry upon the social and economic welfare of the

country. The modern tendency should be to meet technical problems by application of engineering and technical knowledge based upon a sound analysis of the factual features involved.

"There is adequate precedent established to indicate the workability of such a plan and the high [fol. 260] degree of justice resulting from its use. Examples can be found in action taken by the engineering branches of the state government in its highway development activities, as referred to above, and also in the functioning of the Federal Bureau of Public Roads. The latter agency devised a specific and clearcut formula with respect to determining the equities in its national program of highway construction and grade crossing elimination. These are patterns laid down by technical groups eminently qualified in their specialized field and who carry the tremendous responsibility of disbursing millions of dollars of public funds. The several states, without question, accept the formula laid down in the General Administrative Memorandum No. 325 of the U. S. Public Roads Administration when it pertains to funds donated by the Federal Government for state highway purposes." (Pp. 6-7.)

Mr. Jenkins further pointed out in his Report (Ex. 29, R. H.) that delay is the motivating factor at present, rather than safety, for grade separations.

"As the number of grade crossings increased with expansion of railroads and highways, the primary cause for concern was the accident hazard existing at the crossings. It was recognized then and is recognized now that the only effective means of eliminating the hazard is to separate grades of the railroad and the highway. In the early development of the highway system, such separations were constructed for that primary purpose. *During more recent years, however, with the tremendous increase in use of the private automobile, as well as expansion of commercial freight and passenger-carrying operations over the highways, the public resentment against grade crossings and the* [fol. 261] *clamor for an expanded program of crossing*

separations can be attributed in large part to the desire for eliminating the inconvenience and delay to highway traffic caused by railroad trains at highway crossings. The emphasis now is not so much upon eliminating the accident hazard as it is upon expediting the flow of vehicular traffic on the highways, particularly in the highly congested metropolitan areas such as Los Angeles and San Francisco in the west, and New York, Chicago, and Philadelphia in the east. The same degree of impatience is evident on behalf of the average motorist when he is confronted with frustrating traffic congestion on city streets, bridges, freeway approaches, and at other points of thoroughfare clogging. In the general picture, railroads are minor contributors to traffic delay in metropolitan areas.

"As will be shown by factual data in the appendix of this report and in the text, *the railroad now assumes a subordinate position with respect to controlling the design, construction and expansion of the public highway system including its freeways, expressways, multilane highways, and city streets.* Traffic that formerly moved by the more efficient and perhaps less convenient modes of mass transportation has elected to make use of personalized transportation service over the highways and streets, thereby creating traffic congestion and, to a considerable degree, commercial stagnation of central business areas as a result of decentralization —one of the most crucial problems facing the metropolitan areas today. *It is unreasonable to assume that theories propounded in the period from 1860 to 1915, when the railroads predominated the field of long-haul transport, even though they may have been just and fairly administered then, can be taken for granted as* [fol. 262] *constituting equitable treatment now* when the balance of power has swung so far in the other direction as to supremacy of volume of individual vehicle movement." (P. 4.)

The reasons that require a reappraisement of the problem of allocation of grade separation costs were summarized by Mr. Jenkins as follows:

"There are two important principles highlighted by the above discussion. One is that with the tremendous amount of funds that have been appropriated by the federal governmental and administered through one of its principal government agencies, the rules adopted by the government through that agency as to the establishment of the equities involved in the construction of highways, acquisition of properties and rights-of-way, and the separation of railroad grades, must of necessity be given serious consideration as being the product of mature deliberation and able engineering judgment and economic knowledge. Those rules and regulations, theories, and policies established by the federal government in disbursing this tremendous amount of money should not be cast aside as having no bearing upon the issues of an isolated case not included as a part of a national program. They can be looked to with a great deal of confidence as a guide in the establishment of similar formulae for the allocation of costs and recognition of equities involved on any project where the physical aspects are generally the same.

"The second point highlighted is that *the railroads are subjected to tremendous competition by the commercial operators over the highways and that it is illogical to assume that the railroad should be subjected to the major portion or any portion of the cost* [fol. 263] *of constructing facilities that tend to expedite and amplify the competitive aspect*, particularly in those instances where, by such expedited traffic, the railroad stands to realize not one iota of benefit either from the point of view of economics or operation.

"It would appear that the theory propounded in the past and adhered to in some quarters through intervening years, that railroads should carry a continuing obligation to stand the cost of all construction in connection with the building of grade separations and the enlargement and improvement of them, goes

back to the early thinking that developed when the railroads were possibly a complete monopoly and represented a greater hazard to the small amount of traffic which in those days was using the roads and highways. In view of that relatively small volume of traffic and the highly local character it represented at that time when long haul and great distance traffic over the highways was hardly known, it might have been justified in the development of safety measures to assess a heavy responsibility upon the railroads. In consideration of the history of the national highway system, the method by which it is financed, the type of traffic which has been created as a result, and the competitive effect of that traffic upon the railroads, *it appears only logical that the practice of assessing railroads on a continuing obligation theory is outmoded where it involves throwing private funds into the hopper for the purpose of adding to the subsidies already given to competitive highway transportation.*

"A typical and highly important change that has been brought about by the automotive vehicle and the wide application of commercial transport on the exten-
[fol. 264] sive system of highways, freeways and streets, is the decentralization of metropolitan areas such as Los Angeles and San Francisco. This has been brought about by the widespread use of automobiles in home-to-work, business, shopping and pleasure and a lack of sufficient street capacity and parking facilities. It is this trend of use that renders existing automotive thoroughfares inadequate to meet existing and future traffic volumes.

"There has been virtually no change in the extent or character of the transcontinental railroad lines over a period of many years and the changes that have taken place in the metropolitan areas have largely been to make way for the development of those things which are created and expanded by influence of the private automobile." (Pp. 43-44.)

Conclusion.

The issue here is not whether the Washington Boulevard grade separation should be enlarged, but solely whether Petitioner, or any other railroad in a like situation, should pay a share of the cost far exceeding any possible, or even arguable, benefits it might receive.

Neither the Commission nor the City in their Briefs and Answers take any issue with the significant facts that the evidence shows that greater freedom of movement of highway traffic—that is, elimination of vehicular delay upon a major traffic artery—will result from the proposed construction, and is the real and only purpose thereof. Petitioner cannot benefit in any way from this result; indeed, to the extent that competitive traffic (including that moving in private automobiles) using Washington Boulevard is enabled by this improved facility to move more readily or [fol. 93] more cheaply, Petitioner is damaged instead of benefited.

Petitioner's primary obligation at the points of crossing is to do its part in promoting the elimination of those hazards to highway traffic which are incidental to the operation of its railroad. The evidence shows that this obligation was fully discharged many years ago. The proposed widening of the existing separation is plainly not required in the interest of the elimination of grade crossing accidents; and consequently safety considerations cannot be urged as a basis upon which to compel Petitioner to contribute to its cost.

Petitioner will not benefit from the construction through elimination or reduction of interferences with its own operations, for no such interferences now exist. Nor will it benefit appreciably, as apparently believed by the Commission, through the substitution of new and stronger bridge structures for the existing facilities. The latter, though probably not fully conforming to the most recent standards, are entirely adequate and do not presently require replacement.

In the light of the facts and the law, the Commission's order imposing upon Petitioner the payment of approximately $285,000.00, in the face of a complete absence of

any tangible benefits is clearly unfair, unreasonable, arbitrary and burdensome.

It is elementary that Petitioner, like any other citizen, may not be compelled against its will to contribute when [fol. 366] it has no obligation, or to promote the convenience of others (many of them actual or potential competitors) when the net result will be to its own detriment. It is equally well established that the Commission, even though purporting to exercise the police power, may not act arbitrarily, or without adequate evidence to support its conclusions, or in such manner as to deny due process of law or impose undue burden upon interstate commerce.

Nor may the Commission assess costs because it is impressed by the fact it will cost more to widen Washington Boulevard because the railroad is in the way.

The record discloses that the decision here under attack violates these basic principles. Petitioner submits that this Court should issue its writ to review that decision, and upon such review should order the decision annulled and set aside.

Respectfully submitted, Robert W. Walker, J. H. Cummins, *Attorneys for Petitioner.*

[fols. 367-368] In the Supreme Court of the State of California

In the Supreme Court of the State of California

In Bank

The Atchison, Topeka & Santa Fe Railway Co.

v.

Public Utilities Commission, etc., et al.

S.F. 19671

Order Denying Writ of Review—Filed December 11, 1952

Petition for writ of review denied.

Edmonds, J. and Schauer, J. are of the opinion that the petition should be granted.

Shenk, Acting Chief Justice.

(File Endorsement omitted.)

[fol. 269] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title omitted)

PETITION FOR ALLOWANCE OF APPEAL—Filed March 6, 1953

To the Honorable, the Chief Justice of the Supreme Court of the State of California:

Now comes your petitioner The Atchison, Topeka and Santa Fe Railway Company, a corporation, the above named petitioner, and respectfully shows that it duly filed with the Supreme Court of California its Petition for Writ of Review, praying this court to issue its said writ for the purpose of determining the lawfulness of Decision No. 47344 of the Public Utilities Commission of the State of California, dated June 24, 1952, and the Order on Rehearing therein; that by its Petition for Writ of Review your [fol. 270] petitioner raised the federal questions which are the subject of this petition; that on December 11, 1952, this Court rendered and entered its order denying your petitioner's Petition for Writ of Review, and thereby held and decided the said decision of the Public Utilities Commission of the State of California to be valid and lawful; and, that the Supreme Court of California is the highest court of the State of California and the highest court of the said state in which a judgment in this cause could be had;

Wherefore, petitioner, considering itself aggrieved by the aforesaid decree and judgment of the said Court, does, for the reasons set forth in the Statement as to Jurisdiction which is filed herewith, hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment for the correction of the errors set forth in the assignment of errors which is filed herewith; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by petitioner; that the amount of security be fixed by the order allowing the appeal; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States

in accordance with the rules in such case made and provided.

[fol. 271-272] Respectfully submitted,

Jonathan C. Gibson, R. S. Outlaw, Robert W. Walker, Kenneth F. Burgess, Douglas F. Smith, Arthur R. Seder, Jr., Counsel for Petitioner.

Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago 3, Illinois, Of Counsel.

[fol. 273] (File endorsement omitted.)

[fol. 274] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 6, 1953

The Atchison, Topeka and Santa Fe Railway Company, a corporation, the above-named petitioner, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this court in this cause entered on December 11, 1952, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided, and it appearing that there was drawn in question in this cause the validity of an order of the Public Utilities Commission [fol. 275-276] of the State of California on the ground of its repugnance to the Constitution and laws of the United States and that the decision of this Court was in favor of its validity,

Now, therefore, it is hereby ordered, that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of Five Hundred

Dollars ($500.00) with good and sufficient surety, and shall be conditioned as required by law.

It is further ordered that citation shall issue in accordance with law.

It is further ordered that the Clerk of this Court shall make and transmit to the Supreme Court of the United States under his hand and seal a true copy of the material parts of the record in this cause, in accordance with the rules of the said Court in such cases made and provided.

Gibson, Chief Justice.

Dated: Feb. 26, 1953.

[fol. 277] (File endorsement omitted)

[fol. 278-280] Citation in usual form omitted in printing.

[fol. 281] IN THE SUPREME COURT OF THE UNITED STATES

(Title omitted)

ASSIGNMENT OF ERRORS—Filed March 6, 1953

The above named appellant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, in connection with its petition for the allowance of an appeal to the Supreme Court of the United States, makes the following assignment of errors which it avers occurred and upon which it will rely in its prosecution of the said appeal from the final judgment of the Supreme Court of the State of California entered on December 11, 1952.

The Supreme Court of the State of California erred:

1. In not holding that the Order on Rehearing of the California Public Utilities Commission, contained in its [fol. 282] decision No. 47344, dated June 24, 1952, in that it requires appellant to pay an amount bearing no relation to and in excess of any evaluation of the benefits derived by said appellant from certain proposed crossing struc-

tures, will if enforced operate to deprive the appellant of its property without due process of law and to take its property for public use without just compensation, all in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. In not holding that the said Order on Rehearing, insofar as it ordered appellant to bear 50% of the costs of said proposed crossing structures, to be without support in the evidence, without reasonable relation to the evidence, and arbitrary, in violation of the procedural standards guaranteed and required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

3. In not holding that the said Order on Rehearing, in that it assesses against appellant a share of the cost of the proposed structures disproportionate to its share of the benefits to be derived therefrom, will if enforced, deprive the appellant of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

4. In not holding that the said Order on Rehearing, in that it requires appellant to pay an amount in excess of any evaluation of the benefits which will accrue to it from the proposed structures and a share of the total cost thereof larger than its proportionate share of the benefits which [fol. 283-284] will accrue therefrom, will if enforced operate to impose an undue and unreasonable burden on interstate commerce, in violation of the Commerce Clause (Article I, Section 8, Paragraph 3) of the Constitution of the United States and the National Transportation Policy enacted by Congress, 54 Stat. 899 (1940).

Wherefore, appellant, The Atchison, Topeka and Santa Fe Railway Company, prays that the final decree and judgment of the Supreme Court of the State of California be reversed and for such other relief as the Court may deem fit and proper.

Jonathan C. Gibson, R. S. Outlaw, Robert W. Walker, Kenneth F. Burgess, Douglas F. Smith, Arthur R. Seder, Jr., Counsel for Appellant.

Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago 3, Illinois, Of Counsel.

[fol. 285] (File endorsement omitted)

[fol. 286-289] Statement Required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing)

[fol. 290-293] Praecipe (omitted in printing)

[fol. 294-295] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 296] In the Supreme Court of the United States
October Term, 1952

No. 667

The Atchison, Topeka & Santa Fe Railway Company, a corporation, Appellant,

vs.

Public Utilities Commission of the State of California, and City of Los Angeles, a municipal corporation, Appellees.

Appeal from the Supreme Court of the State of California

Statement of Points Relied Upon and Designation of Record for Printing—Filed March 25, 1953

Pursuant to Rule 13, paragraph 9 of this Court, Appellant states as follows:

1. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

2. Appellant designates the entire record herein for printing by the Clerk of this Court.

[fol. 297] Jonathan C. Gibson, R. S. Outlaw, Robert W. Walker, Kenneth F. Burgess, Douglas F. Smith, Arthur R. Seder, Jr., Attorneys for Appellant.
Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago 3, Illinois, Of Counsel.

[fol. 298-300] Proofs of Service (omitted in printing)

[fol. 301] (File endorsement omitted)

[fol. 302] SUPREME COURT OF THE UNITED STATES
No. 667, October Term, 1952.

(Title omitted)

ORDER POSTPONING JURISDICTION—May 18, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits and the case is transferred to the summary docket.